FILE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE McGANN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 23, 1959
CERTIORARI GRANTED JUNE 22, 1959

Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE McGANN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK BROOKLYN NEW YORK**

Criminal 43953

CLARENCE D. MCGANN, APPELLANT-PETITIONER

v.

UNITED STATES OF AMERICA, APPELLEE-RESPONDENT

MOTION TO VACATE AND SET ASIDE JUDGMENT IMPOSED UPON YOUR PETITIONER ON THE 8TH DAY OF AUGUST 1955. BY THE HONORABLE WALTER BRUCHHAVSAN.— filed April 7, 1958

Comes now Clarence Duke McGann, pro se, unlearned in law proceeding in the above styled cause of action herein after known as your petitioner.

Your petitioner now invokes the jurisdiction of this court under Title 28 Section 2255. "*Federal Custody Remedies On Motion Attacking Sentence.*"

STATEMENT OF FACTS

Your petitioner presently confined in the U. S. Penitentiary at Leavenworth, Kansas; sentenced by the above court to a period of 12 years imprisonment to run currently with the sentence of 20 years imposed in the District of Maryland.

1. On May 9, 1955 your petitioner appeared before the court and entered a plea of not guilty.

2. On June 6, your petitioner appeared in court for trial, case was postponed.

3. On July 5, your petitioner appeared in court for trial, case was postponed.

4. On July 6, your petitioner appeared in court for [fol. 2] trial, case was postponed.

5. On July 7, your petitioner appeared in court for trial, case was postponed.

6. On July 8, your petitioner appeared before Judge Inch and entered a plea of guilty.

7. On August 8, 1955 your petitioner made a motion to withdraw plea of guilty, before sentence was imposed. Motion was denied without a hearing or allowing your petitioner to speak.

Your petitioner sworn and deposes: States that he is innocent of the charge of which he pleaded guilty to. And that said plea was made under duress and undue influence.

COMPENDIOUS ARGUMENT

The rights guaranteed to one accused of a crime fall naturally into two classes:

A. Those which the state as well as the accused is interested; and

B. Those which are personal to the accused, which are in the nature of personal privileges.

Those of the first class cannot be waived. Nor can what is essential to judicial proceedings involving deprivation of life or liberty be dispensed with by the consent of the accused. Hopt -v- Utah, 110, U. S. 574, 579 (1884).

When your petitioner made his motion for a withdrawal of a plea of guilty it became the duty of the court to ascertain the reason for this request from the defendant. (Rule XI Federal Rules of Criminal procedure.) Also Rule 32, Note 46, U. S. -v- Lias, C. C. A. W. Va. 1949, 173 F. (2d) 685.

Under our system, society carries the burden of proving its charge against the accused not out of his mouth. It must establish its case, not by interrogation of the accused, even under judicial safe guards, but by evidence independently secured through skillful investigation.

The law will not suffer a prisoner of his own coviction. (Hawkens Pleas of the crown, C. 46 Sec. 34 (8th Ed. 1824).

(It should be noted that your petitioner never stated that he participated in this crime indictment No. Cr. 43953).

[fol. 3] Your petitioner could cite plaitudes of cases, to do this would only take up the courts time, in further

stating a fact which has already be ascertained, namely that I your petitioner was denied due process of law; that the abuse of the courts discretion in refusing to allow a withdrawal of a plea of guilty is a reversible error.

At this time your petitioner respectfully brings to the attention of the court the case of Michinel -v- U. S., 177 F. (2d) 422 at page 424.

> "The duty of the trial court was to have the defendant produced; have evidence received and hear the testimony and arguments as laid down in Walker -v- Johnson supra. Since U. S. -v- Hayman, supra. Its clear that findings of fact and conclusion of law under section 2255 extend also to cases where the events which are alleged to infringe on the constitutional rights of an accused do not appear upon the face of the record of his conviction. The only way the trial court could make findings of fact was with the defendant present." (See United States-v-Paglia, 190 F. (2d) 445, 2 Cir., 1951 in Support).

Wherefore your petitioner request that this court issue a Writ of Habeas Corpus Ad-Prosequendum Ordering that your petitioner be brought before the court to have a hearing and complete findings of fact and conclusion of law thereto. Regarding his allegations.

Or forthwith outline in writing the reasons for further violation of your petitioner's constitutional rights.

I Clarence Duke McGann, petitioner in case number 43953 being lawfully sworn and under oath desposes and says: That I am a prisoner in custody of the United States, under sentence of this Court; that I believe I have substantial grounds upon which to base these claims for relief, and the foregoing motion states true and accurate facts to the best of my knowledge.

Respectfully Submitted

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN,
Petitioner

XXXXXX
DATED: APRIL 2 1958.

[fol. 4] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
BROOKLYN

No. 43953

CLARENCE D. MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT of FORMA PAUPERIS

STATE of KANSAS)
) ss.
COUNTY of LEAVENWORTH)

CLARENCE DUKE MCGANN, being duly sworn according to law deposes and says that he is the PETITIONER in the above-entitled action; that he is a citizen of the United States, and that because of his poverty he is unable to pay the cost of said action or to give security therefor. He verily believes that he has meritorious cause of action; and should be allowed to proceed into a justifiable conclusion of his cause of action; pursuant to Title 28 U. S. C. A., Section 1915.

CLARENCE DUKE MCGANN,
Petitioner

Sworn to and subscribed before me this 2 day of April, 1958

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

/s/ L. J. Gengler, Parole Officer
L. J. GENGLER,
Parole Officer

[fol. 5] (File Endorsement Omitted)

[fol. 6] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. Cr. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE MCGANN, DEFENDANT

MEMORANDUM—April 8, 1958

The defendant, now in custody, has caused to be filed an application, dated April 2, 1958, to set aside the judgment of conviction, pursuant to 28 U.S.C.A. 2255 and for other relief.

The indictment, in substance, charged that the defendant violated 18 U.S.C. 2111 in that he and a co-defendant on April 21, 1954, at Veterans Administration Hospital, Brooklyn, took a sum of money, amounting to $5,414. He was represented by counsel, assigned by the Court. On July 8, 1955, he pleaded guilty. On August 8, 1955, he was sentenced to imprisonment for a term of 12 years, such sentence to run concurrently with a sentence of twenty years, previously imposed by the United States District Court at Baltimore, Maryland, for the robbery of a bank.

The applicant grounds his present plea upon the bare [fol. 7] statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea.

The motion is denied.

/s/ Walter Bruchhausen
U. S. D. J.

[fol. 7a] (File Endorsement Omitted)

[fol. 8] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN NEW YORK

Case No. 43953

(Title Omitted)

AFFIDAVIT IN FORMA PAUPERIS AND APPLICATION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS—
filed April 17, 1958

I, Clarence Duke Mc Gann being duly sworn says that he is the defendant above named; that he is presently confined in the U. S. Penitentiary at Leavenworth, Kansas pursuant to Judgment and Sentence in this case and is now serving such sentence, that he has fo funds with which to pay the expenses of an appeal herein, that he is a citizen of the United States and makes this affidavit in good faith; that he verily believes he has a meritorious cause of action and is entitled to the redress he seeks by appeal; that by reason of his poverty he is unable to pay the cost of an appeal from the Judgment aforesaid, or to give security therefore.

Wherefore, he prays that this Court direct that the annexed Notice of Appeal be filed without pre-payment of fees or cost and that such expenses involved be paid by the government pursuant to the provisions of Section 1915 Title 28 U. S. C. A.

Respectfully Submitted

/s/ Clarence Duke McGann
CLARENCE DUKE MC GANN,
Petitioner

COUNTY OF LEAVENWORTH
S.S.
STATE OF KANSAS

SUBSCRIBED AND SWORN to before me this day 14 of April, 1958.

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

/s/ L. J. Gengler
L. J. GENGLER,
Parole Officer

[fol. 8a] (File Endorsement Omitted)

[fol. 9] IN THE UNITED STATES DISTRICT FOR EASTERN DISTRICT, BROOKLYN, NEW YORK

No. 43953

UNITED STATES OF AMERICA, PLAINTIFF

v.

CLARENCE D. MC GANN, DEFENDANT

NOTICE OF APPEAL—April 14, 1958

Name and Address of Appellant: CLARENCE D. MC GANN

Name and Address of Appellant's Attorney: NONE.

Offenses: VIOLATION OF TITLE 18 SECTION 2111 U. S. C. A.

Concise Statement of Judgment or Order: DENIED. (THE WORD DENIED WAS CONCISE).

Name of Institution Where Now Confined: LEAVENWORTH, KANSAS

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the SECOND CIRCUIT From the above-entitled judgment. Your petitioner feels himself aggrived by This Courts refusal to grant a hearing on a Constitutional Question U. S. -v- Hayman, 342 U. S. 205, 209 N. Y.

Dated: .....

.....
Appellant

COUNTY OF LEAVENWORTH)
) ss...
STATE OF KANSAS)

Subscribed and sworn to before me this 14 day of April, 1957.

.....
L. J. Gengler, Parole Officer

[fol. 10] IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NEW YORK, BROOKLYN

Cr-43953

(Title Omitted)

ORDER DENYING LEAVE TO APPEAL IN FORMA PAUPERIS—
April 18, 1958

The defendant applies for leave to appeal in forma pauperis For the reasons stated in the Courts decision, dated April 18, 1958 and upon all of the statements therein made. I hereby certify that the Appeal is not taken in good faith. The application is denied.

WALTER BRUCHHAUSEN
U. S. District Judge.

DATED April 18, 1958

[fol. 11] IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT
NEW YORK CITY

CLARENCE DUKE MC GANN, APPELLANT EX PARTE

PETITION FOR LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF—
April 28, 1958

The appellant Clarence D. McGann, being furst duly sworn, on oath deposes and says: That he is a citizen of the United States and the appellant in the above entitled cause; that he is unable to pay the costs of said appeal, or to give security for the same; and that he believes that he is entitled to redress and that such redress is taken in good faith.

Your appellant further states that subsequent to the entry of the judgment in this case, an application, accompanied by an affidavit in conformity with section 1915

Title 28 U. S. C., Code, was on April 17, 1958 made to the trial court to permit appellant to prosecute an appeal therein *in Forma Pauperis*, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on the 18th day of April 1958, denied your appellant's application to proceed on appeal without prepayment of fees and costs or to give security therefor, and that the appeal was not taken in good faith.

The nature of the appeal is as follows:

(1) That the plea of guilty entered by the appellant be withdrawn on the grounds that said plea was made under undue influence and being a layman was not familiar with the technicalities of law and that his Constitutional Right by entering a plea of guilty, were violated.

The plea of guilty waives all right, of the appellant. In this case the plea was made against his will.

Wherefore, appellant prays that he be allowed to docket [fol. 12] and proceed with his appeal in this Court without being required to prepay fees or costs, or to give security therefor, and that he be allowed to file an original and four (4) copies of a typewritten brief and appendix thereto, in lieu of printing the same.

Respectfully Submitted

/s/ Clarence D. McGann
CLARENCE DUKE MCGANN,
Petitioner

SUBSCRIBED AND SWORN TO before me this 28th day of April, 1958.

/s/ E. A. Cox
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 13] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CR 43953

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

MOTION FOR APPOINTMENT OF COUNSEL

Comes now, Clarence Duke McGann, Pro. Se., unlearned in Law proceeding in the above styled cause of action, moving this Court for appointment of counsel to prosecute an appeal from an Order made by the Honorable Walter Bruchausen, United States District Judge for the Eastern District of New York; on the 8th day of April, 1958.

Petitioner gave statutory Notice of Appeal on April 14, 1958 and same was denied. On the 25th day of April, Petitioner appealed to the Court of Appeals for the Second Circuit for Leave to Appeal in Forma Pauperis. On May 2nd, 1958, David F. Jordan, Jr., Law Deputy, informed me that leave to proceed In Forma Pauperis has already been granted to co-defendant, Earl Kill Smith, which gives me the same relief.

Petitioner states that he is unable to encase counsel for this appeal; that he is not skilled or versed in the science of Law and that he verily believes he has a meritorious cause of action.

Wherefore, good cause shown, Petitioner prays that counsel be appointed to prosecute the aforesaid appeal.

Respectfully submitted

/s/ Clarence Duke McGann
Clarence Duke McGann
Petitioner

County of Leavenworth)
) s s
State of Kansas)

Subscribed and sworn to before me this ..... day of ....., 1958.

.....
Parole Officer

[fol. 14] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cr. No. 43953

UNITED STATES OF AMERICA,

- against -

CLARENCE DUKE McGANN, DEFENDANT

AFFIDAVIT OF MARIE L. McCANN—May 28, 1958

MARIE L. McCANN, being duly sworn, deposes and says that she is an Assistant United Sttaes Attorney, duly appointed according to law and acting as such.

That she represents the United States of America in the prosecution of the above-captioned matter and is fully familiar with the facts thereof.

That this affidavit is submitted in opposition to a motion by the defendant, CLARENCE DUKE McGANN, for leave to appeal in forma pauperis.

That the defendant apparently wishes to appeal a decision rendered by the Honorable Walter Bruchhausen, United States District Judge for the Eastern District of New York denying, in a memorandum opinion, dated April 8, 1958, a petition by the defendant for an "order that sentence imposed upon your petitioner in the Instant Court Cr. 43953 on August 8, 1955 be subjected to any and all reductions which may be given in the sentence that it is to run wholly concurrently with in the District of Maryland, Or suspend the un-executed portion of the sentence, imposed in the instant court."

That the defendant was charged in a one-count indictment filed on April 29, 1955 with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, Earl Kill Smith, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States currency, from the presence of one Norman Rappaport, at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special

[fol. 15] territorial jurisdiction of the United States.

That on May 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent him, and "after a conference with counsel" McGANN entered a plea of not guilty. (Docket Entries)

That on July 8, 1955, after the case had appeared on the calendar several times, the defendant, still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment.

That on August 8, 1955, after his motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the Southern District of Maryland.

That defendant urges that the judgment of conviction entered on August 8, 1955 should be set aside for the simple reason "that he is innocent of the charge of which he plead (sic) guilty to. And that said plea was made under duress and undue influence." (Defendant's affidavit page 2, annexed hereto)

That on April 8, 1958, in his memorandum opinion denying defendant's motion to set aside the judgment of conviction, Judge Bruchhausen stated that:

> "The applicant grounds his present plea upon the bare statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before the acceptance of the plea."

That on April 18, 1958, defendant's motion for leave to appeal in forma pauperis was denied by Judge Bruchhausen and for the reasons stated in his opinion, he certified that an appeal would not be taken in good faith.

That Title 28, United States Code, Section 1915(a) provide as follows:

[fol. 16] "Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal

therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

That since the defendant alleges no more than that he is innocent of the charge and pleaded guilty under duress, without further details, and since he was represented by counsel at all stages of the proceedings, it is clear that his appeal is without merit.

WHEREFORE, your deponent respectfully requests that defendant's motion for leave to appeal in forma pauperis be in all respects denied.

s Marie L. McCann
MARIE L. McCANN
Assistant U. S. Attorney

Sworn to before me this 28th day of May, 1958.

.....

[fol. 17] * * * *

[fol. 17a] * * * *

[fol. 18] IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FOLEY SQUARE. NEW YORK

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE AN APPEAL IN FORMA PAUPERIS

SUPPLEMENTARY BRIEF IN OPPOSITION TO RELIEF PRAYED FOR BY RESPONDENT

OPINION BELOW

The District Court rendered no opinion other than the word denied. Your Petitioner received no other wording.

QUESTIONS PRESENTED

Whether appeal should be taken in good faith.

STATEMENT

On April 2, 1958, Motion to Vacate Sentence pursuant to Section 2255, Title 28, U.S.C. was filed, setting forth various constitutional violations.

A hearing was not held with the presence of your Petitioner. The Honorable Walter Bruchausen on April 8, 1958, denied Motion of Petitioner. On the 14th day of April, 1958, Petitioner filed Notice of Appeal and permission for leave to appeal in Forma Pauperis, same being denied on the 18th day of April 1958. On the 25th day of April, 1958, Petitioner appealed to the Court of Appeals for the Second Circuit for Leave to Appeal in Forma Pauperis.

REASONS FOR GRANTING THE MOTION OF YOUR PETITIONER

In the District Court Petitioner attacked the Judgment through a collateral issue involving constitutional violations. The Petitioner was denied without the Court making a finding of fact as mandated in Section 2255 Title 28, U.S.C.

"Unless the files and records conclusively" show the petitioner is entitled to no relief, the Court shall set the case down for a hearing". Petitioner submits that the files and records do not show conclusively or otherwise any [fol. 19] any reference to the allegations contained in the Motion to Vacate.

Petitioner submits that the evasion of making a finding of fact as mandated in Section 2255, Title 28, U.S.C. and the sunsquent denial of leave to prosecute an Appeal in Forma Pauperis circumvents Due Process of Law through procedural manuvering. Thus a Petitioner in the Penitentiary must be at the mercy and will of Government counsel. Such an existing condition will and does make it impossible for a person once committed and without funds to engage counsel to protect his rights in a Court of the United States.

CONCLUSION

For the afore-mentioned reasons, the Petition for Leave to Prosecute an Appeal in Forma Pauperis should be granted; and this action is taken in good faith and your Petitioner verily believes he is entitled to the redress herein sought.

Respectfully submitted

/s/ Clarence Duke McGann
Clarence Duke McGann
Petitioner

County of Leavenworth)
) s s
State of Kansas)

Subscribed and sworn to before me this ..... day of ....., 1958.

.....
Parole Officer

[fol. 20] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORDER DISMISSING APPEAL ON MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS.

Denied. See *United States* v. *Earl Kill Smith*, 2 Cir., —— F.2d ——, filed July 24, 1958. And it is further ordered that the appeal be dismissed as frivolous.

C.C.H.
S.R.W.
U.S.C.JJ.
S.J.R.
U.S.D.J.

July , 1958

[fol. 21] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

• • • •

Present:

Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
Circuit Judges,

Hon. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE DUKE MCGANN, DEFENDANT-APPELLANT

ORDER DENYING APPELLANT LEAVE PRO SE TO PROCEED IN FORMA PAUPERIS—July 31, 1958

A motion having been made herein by the appellant pro se for leave to proceed in forma pauperis,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Further ordered that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO
Clerk

• • • •

[fol. 20a] (File Endorsement Omitted

[fol. 22] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AT FOLEY SQUARE (7) NEW YORK

CR. NO. 43953

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

MOTION FOR REHEARING—August 28, 1958

The Appellant, Clarence Duke McGann, moves the above named Court for a rehearing of his case #43953 under Rule 60 (b) of the Federal Rules of Civil Procedure.

> "Motion for relief from judgements, orders, etc., obtained against a party through his mistake, inadvertance, suprise or excusable neglect."

Appellant request that he be given a rehearing on his cause; because he was unaware of the decision in full as handed down by the District Court.

The Clerk of the District never forwarded to the Appellant a full copy of the lower Court's decision. If the Appellant had been supplied a copy of the lower Court's decision he could have expoun ded on the issues made in his first Motion. Appellant was unaware that the lower Court never considered his point of contention "that the refusal of the lower Court to allow the Appellant to withdraw a plea of guilty before imposition of sentence was and is a reversable error."

The Appellant's case, unlike that of Mr. Smith's upon whom the Court based it's decision in Cr. 146-180 of the Southern District, did not request that his plea of guilty be withdrawn. The fact that the Appellant was sentenced to a term of twelve (12) years to run concurrently with a sentence of twenty (20) years in the District Court of Maryland does not make his attempts to clear himself of the later charge frivilious.

The rule in this case which is,

> "The serving of one sentence is not a bar to sentence or prosecution on another."

[fol. 23] The Appellant having the same right and protection of the law as given by the Fourthenth (14) Amendment. "Equal" protection of the law." Wherefore, the serving of one sentence is not a bar to relief on another.

The Appellant was a victim of supprise in not being able to understand the decision of the Courts through neglect of the Clerk of the District Court. Such neglect put the Appellant at predudicial disadvantage in preparing his brief.

Appellant could only contend that he has raised substantial issue of fact, that required a hearing as mandated by Section 2255 of Title 28, U.S.C.

RELIEF PRAYED FOR

Appellanr prays that this Court will grant him a rehearing on his cause and allow him to file a brief bringing forth all his allegations, or in the alternative, remand the case back to the lower Court so that Appellant may expound upon his issues by filing another brief in order that the lower Court may make a finding of fact and conclusion of law thereto.

Respectfully submitted,

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN
Appellant

County of Leavenworth)
) ss
State of Kansas)

Subscribed and sworn to before me this 28 day of August, 1958.

.....
Parole Officer

[fol. 24] STATEMENT OF FACTS

For the Court's information, I received from your office, the complete decision of the Circuit Court of Appeals, for the Second Circuit, on the 22nd of August, 1958. This fact can be upheld by the records kept at this institution.

/s/ .....
CLARENCE DUKE MCGANN
Appellant

[fol. 25] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present:

Hon. CARROLL C. HINCKS,
Hon. STERRY R. WATERMAN,
Circuit Judges.

Hon. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA, APPELLEE

v.

CLARENCE DUKE MCGANN, APPELLANT

ORDER DENYING MOTION FOR REHEARING—October 3, 1958

A petition for a rehearing having been filed herein by the appellant pro se,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied, without prejudice to another motion in the District Court upon a different and more complete statement of facts.

Clerk

[fol. 26] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK

CR-43953

CLARENCE DUKE MCGANN, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

AFFIDAVIT IN FORMA PAUPERIS—October 16, 1958

Affidavit in Forma Pauperis and Motion for proceedings in the above styled cause.

Comes now Clarence Duke McGann in the above styled cause who states and deposes, to-wit: That he is a citizen of the United States, of sound mind, of legal age and desires action from this Honorable Court pursuant to the sections and statutes of law that pertain to his cause: that he verily believes his actions to be meritorious; that he files in good faith and with the purpose of obtaining justice for his cause.

Further, petitioner prays this Honorable Court grant him leave to file this action in Forma Pauperis due to the petitioner's poverty and because of petitioner's inability to prepay costs of filing of fees thereof and that petitioner has no property and therefore is unable to give security.

Wherefore, petitioner prays this Honorable Court for permission to file and proceed to a justifiable conclusion of his cause in Forma Pauperis.

Respectfully submitted,

/s/ Clarence Duke McGann
CLARENCE DUKE MCGANN,
Petitioner Pro-Se

County of Leavenworth)
State of Kansas) SS

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 27] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK

(Title Omitted)

MOTION TO VACATE SENTENCE—filed October —, 1958

JURISDICTIONAL STATEMENT

Comes now the Clarence Duke McGann herein after known as the Appellant. Now invokes the Jurisdiction of this Court under Title 28, Section 2255, U. S. C. which gives said Court the power and authority to Vacate and Set Aside a sentence of conviction, where there is a violation of a prisoner's constitutional rights, with said illegal conviction creating evidence to substantiate a collateral attack, where there is a Constitutional question invoked.

STATEMENT OF FACTS

The Appellant is presently confined in the United States Penitentiary at Leavenworth, Kansas, serving a sentence imposed in this District Court in the above numbered case; for alleged violation of Title 18, Section 2111, Robbery on the Special Maritime and Territorial Jurisdiction of the United States.

QUESTION PRESENTED

Is the Appellant entitled to a fair and impartial trial?

Was the refusal of the District Court to allow the Appellant to withdraw his plea before imposition of sentence, without making a finding of fact, an abuse of judicial discretion and a reversable error?

The Appellant says that he was entitled to a fair and impartial trial. He further says that the refusal of the District Court to allow the Appellant to withdraw his plea of guilty before imposition of sentence, without making a finding of fact, is an abuse of judicial discretion and a reversable error.

[fol. 28] STATEMENT OF THE CASE

As the Appellant desires that this Court understands the manner in which the Appellant was denied his Constitutional rights, he thinks it necessary to show to the Court the *collusion* between the U. S. Attorney's of the Southern and Eastern Districts of New York in Cr. Nos. 146-180 and 43953, respectively.

On April 26, 1955, the U. S. District Court for the Southern District (Cr. 146-180) issued a *Writ of Habeas Corpus Ad Prosequendum* for the Appellant.

On the 4th of May, 1955, the Appellant was brought before the Honorable Justice Leibell of S. D. without attorney; Appellant pleaded "not guilty". The Court could not make appointment of Attorney at the time. The Justice stated that I be brought back to Court next week to make appointment of Counsel.

On the 9th of May, 1955, the Appellant was taken before the District Court in the Eastern District. Appellant plead "not guilty" to the charge of Armed Robbery on the Maritime an Territorial Jurisdiction of the U. S. Benjamin Glass was appointed as Attorney for the Appellant and Co-defendant, Earl K. Smith, whom pleaded "guilty". Case adjourned until 6 June, 1958,

On May 10th, 1955, Appellant was brought before the District Court, Southern District. Appellant was appointed one Samual B. Altman as Attorney. Appellant entered a plea of "not guilty" to the charge of Bank Robbery. Trial was set for the 20th of June, 1955.

On May 17, 1955, Appellant was taken from the Federal House of Detention and placed in the City Prison at 125 White Street.

During this period the Appellant was question by the F. B. I. Appellant maintained his innocence.

On May 18, 1955, Appellant filed a Motion and mailed it from the City Prison. Said Motion was returned by the Clerk of the District Court as there was not an affidavit of Forma Pauperis attached. Said Motion was held in the prison one week by City Officials. On June 5, Appellant filed another Motion requesting that he be returned to the Federal House of Detention at West Street as he was a Federal Prisoner and was serving a

Federal sentence. Appellant further stated in his motion that he was being *subjected to Duress in order to get him to change his plea of Not Guilty.* Motion was set for hearing on the same day as the trial.

On June 6, 1955, Appellant was taken to the Eastern District before Chief, Justice "Inch". Appellant main- [fol. 29] tained his plea of "not guilty". Case was adjourned until July 5th, 1955.

On June 20, 1955, Appellant was returned to the Sothern District. The U. S. Attorney George S. Leisure, made a statement to the effect "that my Court appointed attorney told him that he didn't feel it his duty to argue my motion". He was only appointed to argue the case itself. The Appellant then argued his own motion unseccessfully. The trial was again postponed until the 27th of June, 1955.

"The Appellant wishes the Court to note that during all these appearences in the Southern and Eastern District, the Government nor my Court appointed attorney made any move to form a Jury."

On June 27, 1955, Appellant appeared in the Southern District. As the Appellant was entering the Court the U. S. Attorney, Mr. Leisure, was asking the Court for a postponement. When the Appellant came to a stop at his position in the Court, the Appellants Court appointed Attorney, S. D. Altman, had seconded the request of the Government, and the Appellant was being removed from the Court Room, having been in Court, the exceedingly long time of 30 seconds.

Approximitely 30 minutes more or less after, I was taken from the Court Room. My Court appointed lawyer, Mr. S. B. Altman, came down to talk to me. He told me why not play ball with the U. S. Attorney. He only wanted the win on his record as it was a Bank Robbery case and that the Government would ask for a suspended sentence or a very light sentence as not to interfere with my chances of release in the Maryland case. They would also have me transferred back to the Federal House of Detention where living conditions where better. (For in a city jail, without money, you cannot even get toothpaste, and some 25 men shave with the same razor blade. Change of clothing is unheard of.) I told my lawyer

that I would go along with the Court on those grounds as long as the sentence didn't interfere with my chances of release on the Maryland sentence.

I was returned to the Southern District on the 28th of June, 1955, at which time I withdrew my plea of "not guilty" and entered a plea of "guilty".

Upon leaving the Court Room, Mr. Leisure, U. S. Attorney, came downstairs to talk to me. He confirmed the promises made to me by my court appointed attorney. He even went a step further and requested that I change my plea in the Eastern District.

I told him that if the Attorney in the Eastern District [fol. 30] would make me the same agreement, and ask that no sentence be imposed, or if one was imposed it wouldn't interfer with my chances of release in the Maryland case, which would mean a sentence not exceeding five years.

Mr. Leisure, than called the U. S. Attorney in the Eastern District, Miss Marie McCann. He told Miss McCann to come and see me at the City Prison at 125 White Street and see what kind of agreement we could make. Mr. Leisure then told me he called her and she would come to see me tomorrow, the 29th of June.

On the 29th of June, 1955, Miss Marie McCann, along with another U. S. Attorney came to visit me at the City Prison during the lunch period.

A number of the guards and Co-officer's of my brother whom was a correction officer at the time, recongized Miss McCann from her recent T. V. appearence on the Show entitled "What's My Line".

Miss McCann made the same agreement with me as the U. S. Atty. Mr. Leisure, in agreeing to ask that a suspended sentence be given, or if sentence was imposed that a light sentence be imposed so as not to interfer with my chances in the Maryland Case. Miss McCann than asked me what was my contentions in the Maryland Case. I explained to her that I was sentenced twice for the same crime. One sentence was for five years and another for twenty years on two different indictments. (See indictments 23017 and 23024, U. S. District Court, for the District of Maryland-Baltimore).

I was brought back to the Eastern District a total of four time after the 6th of June before I changed my plea

to guilty. The reason for the delay was that I was waiting for the U. S. Atty. to have me returned to the Federal House of Detention at West Street. I entered my plea of Guilty on the 8th of July, 1955.

A few days later the F. B. I. called me down to the Court House and asked me to sign a confession and tell them about the crimes. I told them that I made a deal and now it was up to the Government to keep up their end of it. I would not sign any statement, nor would I admit that I took part or knew anything about the crimes alleged.

On August 3, I was brought before the Hon. Judge Ryan for sentence. Instead of the U. S. Atty. asking that no sentence be imposed, he tried to get me more time. (See Motion filed in opposition to Motion for Correction of sentence, Mark F. Hughes, Asst. U. S. att. 17 Sept. 57, U. S. D. C. 148-180 Southern District). He tried to get for Foster and Smith suspended sentences or light [fol. 31] sentences; even after sentence he try to keep them in New York in order to reduce there sentence.

On th 8th of August, 1955, I was returned to the District of Court of the Eastern District. Whereupon, the Appellant entered a Motion for a withdrawal of a plea of guilty. The Court denied the Motion without making a finding of fact or conclusion of law, thereto.

On the 10th of August, the Appellant filed a Motion to Vacate and Set Aside the sentence on the grounds of undue duress and hardship, etc. Said Motion being filed in the District Court for the Southern District. The Clerk of the Court received my Motion as a "Motion for Reduction of Sentence" although my motion was not so entitled. Some time later I found out that my motion was denied on all points. I did not receive any moving or answering papers nor was I present at the hearing.

On December 15, 1955, under Rule 32, Federal Rules of Criminal Procedure, Motion to withdraw plea of Guilty denied. Honorable Thomas F. Murphy, Judge, Case no. 146-180, Southern District.

On January 30, 1956, under Title 28, Section 2255, motion denied without a hearing. Honorable John W. Clancy, Judge. Case no. 146-180.

The Appellant appealed to the U. S. Court of Appeals

for the Second Circuit on March 13, 1956. Appeal was granted on 21 March, 1956.

On April 23, 1956, the Appellant moved the Court of Appeals for an order which would appoint him counsel and grant him permission to appeal in Forma Pauperis. The Government cross-moved on April 25, 1956, for dismissal of the Appeal on the ground that Appellant's notice of appeal was untimely. On May 7, 1956, the Court of Appeals dismissed the appeal, holding that Rule 37(a), Rules of Criminal Procedure had foiled the appeal.

The Appellant then sucessfully appealed to the Supreme Court, which entered the following order on November 13, 1956, Misc. No. 204.

> "Per Curiam the Motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The order is vacated and the cause remanded to the Court of Appeals for consideration on the merits. United States v. Hayman, 342 U. S. 205, 209 N. H. 352 U.S. 904.

On the 15th of January, 1957, the Appellant filed a second brief in the Court of Appeals requiring that his cause be remanded to the District Court for a hearing as mandated by Hayman v. U. S. Supra.

[fol. 32] The Court of Appeals held that because the Appellant could not claim the right to be released from confinement, which allegation or claim is a jurisdictional prerequesite of such a Motion and further suggested that the Appellant file a Motion for correction of sentence, which Appellant did.

The Appellant then proceeded to again attack the sentence imposed in the U. S. District Court of Maryland. During the Appellants studies at the Law library at the institution, the Appellant became aware of the fact that the position taken by the Court of Appeals in the Second Circuit 240f(2d) 670, was incomplete contrast with the 14th amendment. Whereupon the Appellant filed his motion in Cr. 43953 of the Eastern District of N. Y. under Title 28, Section 2255, charging that his plea of guilty was made under undue influence and duress further stating that his Motion to withdraw a plea of guilty before imposition of a sentence, having been denied with-

out cause or finding of fact is a reversable error, citing case. Dated 2nd, April, 1958.

The Motion was denied without appellant being sent a copy of the decision as handed down by the Court.

On the 28th of April, Appellant filed a notice of appeal in Forma Pauperis. The same being denied without the Appellant getting a certified copy of the order. Appellant was sent a sheet of paper without regular Court heading, and without being signed by any employee of the Government or office of the clerk. The order stated that the appeal was not taken in good faith. Appellant appealed to the United States Court of Appeals for the Second Circuit.

The Appellant argued his motion on the grounds that he raised substational issues of facts that required a hearing as mandated by Title 28, Section 2255, and interpreted by the Supreme Court in Hayman vs. U. S. Supra. It then came to the attention of the Appellant that the District Court gave more than a one word decision in denying his motion of April 2, 1958.

The Court of Appeals denied the Appellants motion for leave to appeal in forma pauperis. "Denied. See U. S. v. Earl Kill Smith, 2 Cir. F.2d, filed July 24, 1958, and it is further ordered that the appeal be dismissed as Frivolous."

C.C. H.
S. R. W.
U. S. C. J, J.
S. J. R.
U. S. D. J.

[fol. 33] On the 28th day of August, 1958, Appellant filed a Motion for rehearing on the grounds that he was at a prejudicial disadvantage, due to the neglect of the Clerk of the Court to inform the Appellant of the decision in full as rendered by the Court.

The Court of Appeals denied Motion for a rehearing without prejudice to another Motion in the District Court upon a different and more complete statement of facts.

Following upon the order as rendered by the Court of Appeals, the Appellant now files his second brief in this cause.

COMPEDIOUS AGRUEMENT

The Constitutional guaranty of equal protection of Law to people of the Commonwealth, implies that all litigants simflarly sitituated may appeal to Courts for both relief and defense under like conditions, with like protection and without discrimination. This principle was clearly outlined in the Supreme Court decision of the now famous Palko v. State of Connecticut 302 U. S. 319, 58, S. Ct. 149, 82 L. Ed.

The Appellant at the time sentence was imposed in Cr. Nos. 146-180, Southern District, and 43953, Eastern District of New York was serving a sentence imposed in the District Court for the District of Maryland.

The government proceeding under the rule "*that the serving of one sentence is not a bar to prosecution on another.*" Under the rights giving the Appellant by the 14th Amendment namely, equal protection of the law, the Appellant seeks relief upon the sentences imposed in the Eastern and Southern District of N. Y. under the rule "*that the serving of one sentence is not a bar to relief on another.* To hold otherwise would be to nullify the 14th Amendment.

On June 29, 1955, the Appellant was visited at the City prison, 125 White Street, by Miss Marie McCann and another U. S. Attorney. There was no other persons present other than the two U. S. Attys. and myself, my court appointed atty. was not present. Nor had I, the Appellant entered a plea of guilty. The purpose of the visit was to induce the Appellant to plead guilty. Miss McCann promised the Appellant that if he pleaded guilty; she would request that no sentence be imposed, and if one was imposed it would be a light sentence so as not to interfer with my chances of release on the Maryland sentence, of which she knew that I was going to attack upon grounds of double jeopardy.

[fol. 34] On the 8th of July, 1955, Appellant entered his plea of guilty, on August 3, 1955, Appellant realized that he had been tricked, as the Government Attorney in the Southern District of New York had not kept his promise and tried to get the Appellant more time. Therefore, on the 8th of August, 1955, the Appellant made a Motion to withdraw his plea of guilty before imposition

of sentence in Cr. 43953 in the Eastern District. Withdrawal of a plea of guilty will be permitted if it clearly appears that plea was entered by defendant as a result of fear, coercion, or mistakes. The denieal of the Court to allow withdrawal of a plea of guilty is a reversable error. It is necessary that the accused show in support of his motion that the plea of guilty should not be allowed to stand against him because of some reason existing when it was entered, but for which he would not have entered the plea, and that reason must amount to a fraud or an imposition upon him or a misapprehension of his legal rights. (Bergen vs. U.S. 145 F 2d 181) (Townsend v. Burke, 334 U. S. 736, 738, 68 S. Ct. 1252, 1254)

The District Court did not allow the Appellant to withdraw his plea of guilty; nor did the District Court allow the Appellant to give reasons for his motion for withdrawal of his plea of guilty, but denied his motion without any finding fact or conclusion of law thereto, which is a reversable error.

The Appellant has shown that the Government through the extra judicial procedure of its Attorney which amounts to a violation if the Appellants Constitutional rights INDUCED HIM TO PLEAD GUILTY TO TWO CRIMES OF WHICH HE IS INNOCENCE.

A check with the F. B. I. will show that the Appellant never signed nor made a statement admitting any knowledge of the crimes alleged.

It should seem that when charges raises a substantial issue of fact, in these circumstances, that the Appellee should welcome a hearing to silence the charges that the Appellant has been the victim of a tinted conviction.

But to the contrary, the Appellee has used its superior legal knowledge to keep the Appellant from having a hearing in open Court.

ISSUANCE OF SHOW CAUSE ORDER

Comes now the Appellant-Petitioner, Clarence Duke McGann, and moves the Honorable Court to issue an order, commanding the United States of America, who is the Respondent, by it's Government Counsel to show [fol. 35] legal and just cause under oath as prescribed

under Rule 12 of the rules of Civil Procedure within twenty (20) days as to why the convictions under CR. 43953 should not be vacated and release the Appellant-Petitioner from the custody of said Respondent.

CONCLUSION

Your Petitioner, Clarence Duke McGann, certifies that he is submitting this Motion in good faith, he verily believes the matters and things contained therein, are meritorious and well founded in fact and law.

Respectfully submitted,

/s Clarence Duke McGann
Clarence Duke McGann

County of Leavenworth)
) SS
State of Kansas)

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

[fol. 35a] (File Endorsement Omitted)

[fol. 36] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, BROOKLYN, NEW YORK

Cr. 43953

CLARENCE DUKE McGANN, PETITIONER-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

To: The Honorable Walter Bruchhausen, United States District Judge.

MOTION FOR SUBPOENA TO PRODUCE DOCUMENTS—filed October 20, 1958

The Appellant request that the below named Official of the Department of Corrections of the City of New York, namely, Mr. Hugh L. Tunney, Secretary of the Board of Corrections be subpoena to produce the records of all visits as made to the Appellant by Agents of the Government, namely, U. S. Attorneys whom visited the Appellant at the City prison at 125 White Street in New York City, on the 29th of June, 1955. The Appellant states that these documents will sustain the extra judicial efforts as made by the Government in order to deny the Appellant of his Constitutional rights.

Wherefore the Appellant prays that this Court will issue a subpoena to the above named Official to produce the documents requested. This request is made in connection with a Motion to Vacate Sentence.

Respectfully submitted,

s. Clarence Duke McGann
Clarence Duke McGann

County of Leavenworth)
) ss
State of Kansas)

Subscribed and sworn to before me this 16th day of October, 1958.

/s/ A. W. Peters
Parole Officer

"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C. 4004)."

Order Denying Motion—October 20, 1958

There is no legal authority for the issuance of a subpoena under these circumstances. Hence the application is denied.

/s/ Walter Bruchhausen
U. S. D. J.

Dated October 20, 1958.

[fol. 36a] (File Endorsement Omitted)

[fol. 37] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

United States of America

- against -

Clarence Duke McGann, defendant

Affidavit of Marie L. McCann—filed November 12, 1958

State of New York)
) ss
County of Kings)

Marie L. McCann, being duly sworn, deposes and says that she is an Assistant United States Attorney for the Eastern District of New York, duly appointed according to law and acting as such.

That she represented the United States of America in the prosecution of the above-captioned matter, and is fully familiar with the facts therein.

That this affidavit is submitted in opposition to defendant's motion to vacate and set aside a judgment of conviction entered against him on August 8, 1955.

That the defendant was charged in a one count indictment filed on April 29, 1955 with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, Earl Kill Smith, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States currency from the presence of one Norman Rappaport, at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special territorial jurisdiction of the United States.

That on May, 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent him, and "after a conference with counsel" McGANN entered a plea of not guilty. (Docket Entries)

That on July 8, 1955, after the case had appeared on the calendar several times, the defendant, still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment. [fol. 38] That on August 8, 1955, after a motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the United States District Court for the District of Maryland.

That in a motion filed on April 7, 1958, defendant petitioned for an "order that sentence imposed upon your petitioner in the Instant Court Cr. 43953 on August 8, 1955 be subjected to any and all reductions which may be given in the sentence that it is to run wholly concurrently with in the District of Maryland, Or suspend the un-executed portion of the sentence, imposed in the instant court."

That the basis of that motion was that defendant was "innocent of the charge of which he plead (sic) guilty to.

And that said plea was made under duress and undue influence." (Defendant's affidavit, page 2)

That on April 8, 1958, in a memorandum opinion denying defendant's motion to set aside the judgment of conviction, Judge Bruchhausen stated that

> "The applicant grounds his present plea upon the bare statements that he is innocent of the charge and that he pleaded guilty under duress and undue influence. There is no amplification thereof. The record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before the acceptance of the plea."

That on April 18, 1958, defendant's motion for leave to appeal in forma pauperis was denied by Judge Bruchhausen and for the reasons stated in his opinion, he certified that an appeal would not be taken in good faith.

That the United States Court of Appeals for the Second Circuit, denied defendant's motion for leave to appeal in forma pauperis, stating:

> "Denied. See *United States* v. *Earl Kill Smith*, 2 Cir., —— F.2d ——, filed July 24, 1958. And it is further ordered that the appeal be dismissed as frivolous."

That the basis of defendant's present motion is apparently confined to alleged promises of a suspended sentence on a plea of guilty made to him by your deponent and by George S. Leisure, Jr., formerly an Assistant United States Attorney for the Southern District [fol. 39] of New York, now engaged in the private practice of law.

That as is apparent from defendant's moving papers, defendant is a persistant movant who has already litigated the question of promises allegedly made to him by Mr. Leisure in motions brought in the United States District Court for the Southern District of New York, and having failed in his efforts in that District, is now apparently seeking to relitigate the same issues in the Eastern District of New York.

That in defendant's moving papers filed in the Southern District of New York, he also accused deponent of making him promises in order to induce a plea of guilty.

That your deponent, together with Assistant United States Attorney Kenneth C. Sternberg, did visit defendant while he was confined in the New York City Prison, at defendant's request.

That your deponent has no present recollection of the manner in which that request was relayed to her, however, she categorically denies that at any time she made any promises of a suspended sentence to the defendant, nor did Mr. Sternberg make any such promises at the time he accompanied her on her visit to defendant.

That at no time did your deponent indicate to Mr. Leisure that the defendant might get a suspended sentence on the charge pending against him in the Eastern District of New York.

That your deponent has discussed the present motion with Mr. Leisure who has stated his willingness to submit an affidavit to the effect that at no time did he promise the defendant a suspended sentence in connection with the matter pending in this court.

That in *United States* v. *Earl Kill Smith*, 257 F.2d 432 (2d Cir. 1958), the Court of Appeals for the Second Circuit, in connection with McGANN's co-defendant, stated:

> "His admissions made on such solemn occasions as arraignment and sentence in open court in the presence of his counsel and the judge are more trustworthy than the assertion now made by motion two years later in Alcatraz, at least in the absence of credible and independent evidence showing some infirmity in the plea." (p. 434)

[fol. 40] That with respect to the allegations against Mr. Leisure, the words of the Court of Appeals in the *Smith* case seem particularly pertinent:

> "'If he chose to rely upon representations of those who had no power to commit the prosecutor, he took the same chances that anyone does who does not ascertain whether his promisor has the power to speak for another.'" (p. 434)

That assuming that Mr. Leisure had made any such promises to defendant in connection with the Eastern

District case, it is clear that he would have had no power whatsoever over the sentence which this court saw fit to impose, and moreover, that there would have been no reason for defendant to believe that he did have such power.

That in *United States* v. *McGann*, 245 F.2d 670 (2d Cir. 1957), the Court stated at page 672:

> ". . . Section 2255 is available only to a prisoner claiming the right to immediate release if the issues are determined in his favor. Since appellant cannot claim to be released because of any infirmities in the sentence in the Southern District of New York so long as he is lawfully in custody under the uncompleted sentence imposed in the District of Maryland, the validity of which remains unchallenged, his application under Section 2255 is premature."

WHEREFORE, your deponent respectfully requests that defendant's motion be in all respects denied.

/s/ Marie L. McCann
MARIE L. McCANN

Sworn to before me this 12th day of November, 1958

/s/ Henry Bramwell
HENRY BRAMWELL

Notary Public, State of New York, Qualified in Kings County, No. 24-0390450, Commission Expires March 30, 1959

[fol. 41] AFFIDAVIT OF MAILING
(Omitted in Printing)

[fol. 41a] (File Endorsement Omitted)

[fol. 42] IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cr. No. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE McGANN, DEFENDANT

MEMORANDUM—November 18, 1958

The defendant, now in custody, moves to vacate the judgment of conviction herein upon the ground that he was induced by an Assistant United States Attorney to plead guilty upon a promise to ask the court for a light sentence, that the promise was not kept, that he then sought to withdraw the plea and was rebuffed.

The defendant was indicted for three offenses committed within a six month period in 1954, i.e., for a robbery by force and violence in this district, a robbery in the Southern District of New York and a robbery in the District of Maryland.

In September 1954, he was sentenced by the said Maryland Court to imprisonment for a term of twenty years. On or about August 3, 1955, he pleaded guilty to the charge in the said Southern District Court and was sen-[fol. 43] tenced to a term of imprisonment. On August 8, 1955, after pleading guilty in this court to the charge therein pending, he was sentenced to imprisonment for a term of twelve years to run concurrently with the twenty year sentence in Maryland.

The motion papers are voluminous. The defendant charges acts of misfeasance or non feasance allegedly committed by representatives of the United States Attorneys in the Southern and Eastern Districts, individually and in combination, and by the attorney assigned to him and also claims that he was the victim of double jeopardy in the Maryland Court. The substance of these allegations has been previously urged by the defendant by means of various motions and applications and on appeal.

The defendant's main objective is to upset the Maryland conviction. He seems convinced that suspended or light sentences on the convictions in the Southern and Eastern Districts of New York will strengthen his position in Maryland.

He also contends that the said Assistant United States Attorneys conspired to induce him to plead guilty to the charges in the said districts of New York by assuring him that they would request suspended or light sentences and that upon non performance he endeavored to withdraw those pleas but without success.

THE DEFENDANT'S VERSION OF THE EVENTS LEADING UP TO HIS ADMISSION OF GUILT IN THIS COURT

[fol. 44] On May 9, 1955, the defendant was arraigned on an indictment charging that he and a co-defendant, Earl Kill Smith, on April 21, 1954, at the Veterans Administration Hospital did take by force and violence the sum of $5414 in currency. He pleaded not guilty. Mr. Benjamin Glass, an attorney, was assigned to represent him.

The defendant asserts that on June 29, 1955, an Assistant United States Attorney of this district agreed that if he pleaded guilty the said official would ask for a suspended or light sentence so as not to interfere with his chances in the Maryland case.

On July 8, 1955, while still represented by assigned counsel, he appeared in this court, withdrew his plea of not guilty and entered a plea of guilty. The record shows that he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent.

On August 8, 1955, while still represented by assigned counsel, the defendant was brought into court. Having discovered shortly prior thereto that the Assistant United States Attorney in the Southern District Court failed to request a light sentence, he decided to and did request this court to permit him to withdraw his plea of guilty which was denied.

THE SUBSTANCE OF THE DEFENDANT'S PLEA FOR RELIEF INSOFAR AS THE PROCEEDINGS IN THIS COURT ARE CONCERNED

[fol. 45] The defendant, in essence, claims that the failure of the Assistant United States Attorney to request a light sentence, pursuant to agreement to do so, entitled him to withdraw his plea of guilty entered upon such assurance.

THE ANALYSIS OF THE DEFENDANT'S CLAIM

The sentences in the Southern and Eastern District Courts would have no effect whatever upon the Maryland Court in determining the issue of double jeopardy. It is settled law that such an issue must be adjudicated upon the record in the court where it is raised, unaffected by occurrences elsewhere.

Assuming, without conceding, that either or both of the Assistants in the offices of the District Attorneys agreed with the defendant to plead for lighter sentences and didn't do so, such omissions could not and did not impinge upon his legal rights or alter his status in that the court, in fixing punishment, gave him full credit for the plea of guilty and the consequent avoidance of a trial. The added supplications of the defendant's adherents could add nothing toward a proper and just determination of the sentence. The Court, fully aware and cognizant of that consideration as well as all other factors remained the sole arbiter of the sentence and exercised its function, as prescribed by law. See also United States [fol. 46] v. Earl Kill Smith, 2 Cir., 257 F.2d 432.

The motion is denied.

/s/ Walter Bruchhausen
U. S. D. J.

[fol. 46a] (File Endorsement Omitted)

[fol. 47] IN THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

CLARENCE D. McGANN, APPELLANT, EX PARTE

PETITION FOR LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS AND AFFIDAVIT IN SUPPORT THEREOF— December 10, 1958

The Appellant, CLARENCE D. McGANN, being first duly sworn, on oath deposes and says; that he is a citizen of the United States and the Appellant in the above entitled cause; that he is unable to pay the costs of said appeal or to give security for the same; and that he believes that he is entitled to the redress he seeks and that such redress is taken in good faith.

Your Appellant further states that subsequent to the entry of the judgment in this case, an application, accompanied by an affidavit in conformity with Section 1915, Title 28, U. S. C. Code was on December 10th, 1958 made to the Trial Court to permit Appellant to prosecute an appeal therein in Forma Pauperis, thereby enabling the Trial Judge to certify whether or not the appeal was taken in good faith, and that the Trial Court on the 14th day of December 1958, denied your Appellants application to proceed on appeal without prepayment of fees and costs or to give security thereof.

The District Court did not certify that the appeal was not taken in good faith. The word denied was consise. The orginal application to perfect an appeal to this Court and the order of the Court is attached to this petition as exhibit "A".

THE NATURE OF THE APPEAL IS AS FOLLOWS:

The Appellant contends that he was induced by the Government, to enter a plea of guilty the Appellant being a layman and not familiar with the technicalities of law, entered a plea of guilty. Prior to impositition of sentence the Appellant made a motion to withdraw his plea of guilty. The Court denied this motion without making a finding of fact, as to why it was made.

[fol. 48] The Appellant believes that the refusal of the District Court to allow the Appellant to withdraw a plea

of guilty without making a finding of fact is an abuse of judicial discretion and a reverseable error!

This point was argued in the District Court by the Appellant; but the Honorable Walter Bruchhausen, did not rule on the point of law as contended by the Appellant. It completely ignored it, as though it was never mentioned.

Although the Government Agents admitted that they committed extra judicial proceeding with the Appellant; prior to his entry of a plea of guilty.

Wherefore, Appellant prays that he be allowed to docket and proceed with his appeal in this Court without being required to prepay fees or costs, or to give security therefor, and that he be allowed to file an original and four (4) copies of a type written brief and appendix thereto in liev of printing the same.

Respectfully Submitted,

/s/ Clarence D. McGann
Clarence D. McGann

Leavenworth County)
) ss
State of Kansas)

Subscribed and sworn to before me this 10th day of December, 1958.

/s/ A. W. Peters
Parole Officer

Application Denied:

Walter Bruckhausen,
U.S.D.J.

Dec. 14, 1958

[fol. 49] IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Cr. 43953

CLARENCE DUKE McGANN, APPELLANT-PETITIONER

v.

UNITED STATES OF AMERICA, APPELLEE-RESPONDENT

EXHIBIT A TO PETITION

NOTICE IS HEREBY GIVEN THAT CLARENCE DUKE McGANN ABOVE NAMED, HEREBY APPEALS TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, FROM THE ORDER ENTERED IN THIS ACTION ON THE 18TH DAY OF NOVEMBER 1958 BY THE HONORABLE WALTER BRUCHHAUSEN.

The Appellant feels himself aggrieved by this Court's decision; Appellant feels that he has a meritorious cause of action and that he is entitled to the redress he seeks by appeal.

The nature of the Appeal is as follows:

(1) Is the Appellant entitled to a fair and impartial trial?

(2) Was the refusal of the District Court to allow the Appellant to withdraw his plea before imposition of sentence, without making a finding of fact, an abuse of judicial discretion and a reverseable error?

Wherefore the petitioner prays that this Court will allow him to file this appeal without prepayment of filing fees or cost, pursuant to Title 28, Section 1915, as the petitioner is a pauper and a citizen of the United States and is unable to prepay costs of filing fees thereof.

Respectfully submitted,

/s/ Clarence D. McGann,
Clarence D. McGann,
Appellant-Petitioner

State of Kansas)
) ss
County of Leavenworth)

Subscribed and sworn to before me this 10th day of December, 1958.

/s/ A. W. Peters
Parole Officer

Application Denied:

True Copy of Order
Dec. 14, 1958

Walter Bruchhausen,
U.S.D.J.

[fol. 49a] (File Endorsement Omitted)

[fol. 50] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Cr. No. 43953

UNITED STATES OF AMERICA

- against -

CLARENCE DUKE McGANN, DEFENDANT

AFFIDAVIT OF MARIE L. McCANN—February 10, 1959

MARIE L. McCANN, being duly sworn, deposes and says that she is an Assistant United States Attorney for the Eastern District, New York, duly appointed according to law and acting as such.

That she represents the United States of America in connection with the above captioned matter and is fully familiar with the facts therein.

That this affidavit is made in opposition to a motion by the defendant CLARENCE DUKE McGANN, for leave to appeal *in forma pauperis*, and in support of a motion by the United States of America for an order dismissing the defendant's appeal on the ground that it is completely without merit and frivolous on its face.

That the defendant was charged in a one count indictment filed on April 29, 1955, with a violation of Title 18, United States Code, Section 2111, in that on or about April 21, 1954, he and a co-defendant, CARL KILL SMITH, did take by force and violence, and by intimidation, the amount of approximately Five Thousand Four Hundred Fourteen Dollars ($5,414.00) in United States Currency, from the presence of one NORMAN RAPPAPORT at the Veterans Administration Hospital, Brooklyn, New York, within the Eastern District of New York, and the special territorial jurisdiction of the United States.

That on May 9, 1955, the defendant was arraigned before the Honorable Walter Bruchhausen who assigned Benjamin Glass, Esq. to represent to represent him and "after a conference with counsel" McGANN entered a plea of not guilty. (Docket Entries)

[fol. 51] That on July 8, 1955, after the case had appeared on the calendar several times, the defendant still represented by counsel, who was present, withdrew his plea of not guilty and entered a plea of guilty to the indictment.

That on August 8, 1955, after his motion to withdraw his guilty plea was denied, the defendant was sentenced to a term of imprisonment for 12 years, to run concurrently with a sentence of 20 years imposed by the District of Maryland.

That on October 30, 1957, the defendant made a motion for reduction of sentence, which was denied after a hearing on November 4, 1957.

That on April 7, 1958, the defendant filed a motion to vacate and set aside the judgment of conviction against him, which was denied by the Honorable Walter Bruchhausen in a memorandum dated April 8, 1958.

That on April 17, 1958, the defendant made a motion for leave to appeal *in forma pauperis*, which was denied by Judge Bruchhausen on the same date, at which time he certified that the appeal was not taken in good faith.

That defendant moved for leave to appeal *in forma pauperis* from this order, in the United States Court of Appeals for the Second Circuit, which denied his motion in an order filed on August 21, 1958, and dismissed the appeal as being frivolous.

That on October 20, 1958, defendant made another motion to vacate his judgment of conviction which was denied by Judge Bruchhausen in a memorandum opinion dated November 18, 1958.

That according to the docket entries of the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second [fol. 52] Circuit denied a motion by the defendant to set aside judgment, dated November 10, 1958, and filed November 13, 1958; however, it is not clear to your deponent in just what manner and when defendant made such a motion in the Court of Appeals, and there is no indication of it in the District Court docket entries other than the entry of the receipt of a copy of the order of this Court.

That defendant's present motion is apparently made in connection with an appeal from the order of Judge Bruchhausen entered on November 18, 1958, denying his motion to set aside the judgment of conviction, and he urges as the primary ground for his appeal the denial of his motion to withdraw his plea of guilty, entered after he had received advice of counsel.

That on December 14, 1958, Judge Bruchhausen denied defendant's application for leave to appeal *in forma pauperis.*

That defendant urges that he was induced to plead guilty in the Eastern District of New York by promises of a suspended sentence made to him by your deponent and by George S. Leisure, Jr., Esq., formerly an Assistant United States Attorney for the Southern District of New York.

That your deponent categorically denies that she ever made any such promises to defendant and she has had a conversation with Mr. Leisure in which he indicated a willingness, if necessary, to submit an affidavit that he made no such promises.

That the question of promises allegedly made to defendant has been litigated and re-litigated in the United States District Court for Southern District of New York and the Court of Appeals for the Second Circuit.

[fol. 53] That as Judge Bruchhausen pointed out in his memorandum of November 18, 1958:

> "Assuming, without conceding, that either or both of the Assistants in the offices of the District Attorneys agreed with the defendant to plead for lighter sentences and did not do so, such omissions could not and did not infringe upon his legal rights or alter his status in that the Court, in fixing punishment, gave him full credit for the plea of guilty and the consequent avoidance of a trial. The added supplications of the defendant's adherents could add nothing toward a proper and just determination of the sentence. The Court, fully aware and cognizant of that consideration as well as all other factors remained the sole arbiter of the sentence and exercised its function, as prescribed by law. See also United States v. Earl Kill Smith, 2 Cir., 257 F.2d 432."

That from all of the above facts, it is clear that the only question raised by defendant has been before this Court on a number of previous occasions, has been decided adversely to him, and in any event, is without merit.

WHEREFORE, your deponent respectfully requests that the defendant's motion for leave to appeal *in forma pauperis* be in all respects denied and that his appeal be dismissed.

/s/ Marie L. McCann
MARIE L. McCANN
Assistant U. S. Attorney

Sworn to before me this 10th day of February, 1959.
ROBERT S. KREINDLER

Notary Public, State of New York, No. 24-2198700, Qualified in Kings County, Commission Expires March 30, 195

[fol. 54] • • • •

[fol. 54a] • • • •

[fol. 55] IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
NEW YORK, NEW YORK

Cr. No. 43953

CLARENCE DUKE MCGANN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPELLANT REPLY TO APPELLEE'S MOTION TO DISMISS DATED 10 FEBRUARY 1959

The appellee has given partial facts in it's motion to dismiss. The appellant will try to show the full facts of these statements.

(1) That on July 8, 1955, when the Appellant withdrew his plea of Not Guilty and entered his plea of Guilty. This was done after the Appellant had been visited in the Tombs by the United States Attorney, Miss Marie McCann, and another United States Attorney whom Miss McCann identifys as Mr. Kenneth C. Sternberg. When this visit was made my court appointed attorney was not present. Nor was any agent of the F. B. I. present.

Further when the F. B. I. requested that the Appellant tell them about the crime and sign a confession he told them that he had made a deal with the United States Attorney's, that he had lived up to his part of the bargain by pleading guilty, now it was up to the government to keep it's end of the bargain. The records of the F. B. I. will show or should show that the Appellant made no statement or signed no statements.

That on April 7, 1958, the Appelants motion was denied without a hearing. The Appellant was not served with a copy of the decision of the lower court: as rendered on April 8, 1958 by Judge Bruchhausen.

That on April 17, 1958, the Appellants Motion to Appeal in Forma Pauperis was denied by Judge Bruchhausen, without the Appellant getting a copy of the decision. The appellant received one word which was *denied*.

That this court denied the Appellants motion to Appeal in Forma Pauperis on the basis of Earl Kill Smith ys. United States of America this court on 24 July 1958.

On the 28 of August 1958 the Appellant filed a motion for rehearing upon the grounds, that the appellant he was not aware of the decision of the Lower Court. That he did not know that the lower court never considered his point of contention "that the refusal of the Lower Court to allow the Appellant to withdraw a plea of guilty before imposition of sentence was and is a reversable error."

This court held in its decision of October 1958 "that the Petition for rehearing was denied without prejudice to another motion in the District Court upon a different and more complete statement of facts."

The Appellant following the decision of this court filed a second motion in the District Court putting in full all the facts which involve around his plea of guilty and request that the sentence be vacated upon the grounds that the original plea was made under duress and undue [fol. 56] influence and that the Courts refusal to allow the Appellant to withdraw his plea of guilty was and is a reversable error, as such denial was done without a hearing or finding of fact.

On November 18, 1958 Judge Bruchhausen again denied the appellants without a hearing and again without ruling on the point of law that the Appellant has been contending—Namely that the Court refusal to allow the Appellant to withdraw his plea of guilty without making a finding of fact before imposition of sentence is a reversable error.

That on December 14, 1958, Judge Bruchhausen denied the Appelant's application to Appeal in Forma Pauperis. The word denied was again the only order of the court. The Appellant has attached his copy of the order and has exhibited it as exhibit "A"; on his original motion for leave to Appeal in Forma Pauperis now pending in this court.

The Appellee has relied heavily on this Courts decision in the case of Smith vs United States No. 382 October term 1957, Docket No. 24923 2nd Circuit, Court of Appeals.

The facts of which the decision of the Smith case is based on cannot and do not resemble the present case.

The Appellant did not wait two years to make his request. He made his request before impositition of sentence. Therefore everything that the Appellant states now must be taken as the same facts of which would have been brought out if the Appellant had been granted a hearing when he made his Motion to withdraw his plea of guilty and stand trial.

Nor can the Appellee contend that I relied soly on the promises made to me, for when I made my motion to withdraw my plea of guilty, I then and there showed that I no longer trust the word of the United States Attorney's. For I found out they where not to be trusted.

The last point of which the Appellee rely's on is the decision of Judge Bruchhausen. In which the Lower Court stated that it had taken into consideration my plea of guilty in rendering its sentence, this statement has no effect whatsoever on my constitutional right to trial by Jury.

No matter how much consideration he has given my plea of guilty which was induced and not based upon my own free will. For I am innocent of the crime alleged. He cannot place a price on my constitutional rights. It's my right to have a trial by Jury if I desire. It's also my right according to the present practice to have a hearing on a motion to withdraw a plea of guilty before impositition of sentence to determine the facts involved. This was not done. Wherefore the Appellant moves this court to allow him to Appeal to this Court for Writ of Certiorari directed to the District Court for the Eastern District of New York, in Forma Pauperis. Directing said lower court to vacate set aside the sentence imposed in Cr. No. 43953. See Bergen vs. U. S. 145 F. 2d 181) Townsend v. Burke, 334 U. S. 736, 738, 68 S. Ct. 1252, 1254, also. Dandridge v. United States No. 609 October Term 1957 United States Supreme Court.

Respectfully submitted,

s/ Clarence Duke McGann
Clarence Duke McGann

[fol. 57] PROOF OF SERVICE
(Omitted in Printing)

[fol. 58] IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present: HON. HAROLD R. MEDINA,
HON. CARROLL C. HINCKS,
Circuit Judges.

HON. WILLIAM C. MATHES,
District Judge.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CLARENCE DUKE MCGANN, DEFENDANT-APPELLANT

ORDER DENYING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, ETC.—March 5, 1959

A motion having been made herein by appellant pro se for leave to proceed in forma pauperis,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

Further ordered that the cross-motion to dismiss the appeal be and it hereby is granted, and that the appeal from the order of the United States District Court for the Eastern District of New York be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk

* * * *

[fol. 58a] (File Endorsement Omitted)

[fol. 59] SUPREME COURT OF THE UNITED STATES

No. 731 Misc., October Term, 1958

CLARENCE DUKE McGANN, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 29, 1959

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1039 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 533026 759

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JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE McGANN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

THOMAS HOMER DAVIS
Attorney for Petitioner
402 Shawnee Street
Leavenworth, Kansas

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE MCGANN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

Opinion Below

The order of this Court granting the petitioner's motion for leave to proceed *in forma pauperis* and on petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit handed down on the 29th day of June, 1959 (R. 55).

Jurisdiction

The judgment of the Court of Appeals was entered on March 5, 1959 (R. 54). The petition for writ of certiorari was filed on March 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statement

Petitioner on September 20, 1954, in the United States District Court for the District of Maryland entered his pleas of guilty in Case No. 23017 for armed bank robbery, a sentence of twenty years was imposed. On the same day and at the same time sentence was imposed in Case No. 23023 interstate transportation of a stolen motor vehicle, sentence was for five years concurrent with the above twenty year sentence. And on the same day and at the same time petitioner pled guilty to Case No. 23024, robbery on the maritime and territorial jurisdiction of the United States and was sentenced to five years concurrent with the above twenty year sentence. These sentences have no direct bearing on the instant case except that the Government has used this fact to deny relief to petitioner under 2255. On June 28, 1955, the petitioner entered a plea of guilty to indictment Cr. 146-180 in the Southern District of New York charging petitioner in one count robbery of the Carver Federal Saving and Loan Association in violation of 18 U.S.C. 2113. He was sentenced to twenty years imprisonment, to run concurrently with the sentences imposed by the United States District Court of Maryland above set forth. The sentence likewise has no direct bearing on the issues in this case, except that it was involved in promises made to petitioner.

The case involved in this hearing grows out of an indictment charging the petitioner in the United States District Court for the Eastern District of New York with violation of 18 U.S.C. 2111, in that on or about April 21, 1954, petitioner, with co-defendant, committed an armed robbery at the Veterans Administration Hospital, Brooklyn, New York. Petitioner entered a plea of not guilty (R. 1). On July 8, 1959, petitioner withdrew a plea of not guilty and

entered a plea of guilty (R. 2). On August 8, 1955, petitioner orally in open court asked leave to withdraw his plea of guilty. This motion was summarily denied and petitioner was not afforded the opportunity of taking the stand and presenting his reasons or evidence why such plea of guilty should be allowed to be withdrawn. Petitioner was sentenced to a term of imprisonment for twelve years, to run concurrently with the sentence of twenty years imposed on September 20, 1954, for bank robbery in the District of Maryland (R. 5).

On April 2, 1958, petitioner filed a motion to vacate sentence pursuant to 28 U.S.C. 2255 alleging that he was innocent of the charge of which he pleaded guilty and that the plea was made under duress and undue influence (R. 3 & 4). A memorandum opinion of April 8, 1958, by the District Court (R. 5), denied this motion; remarking that there was no amplification of the bare charge of duress, and stated that the records showed that petitioner "was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea" (R. 5). On April 14, 1958, petitioner filed in the District Court an application for permission to appeal *in forma pauperis* and an affidavit in support thereof (R. 6 & 7). On April 18, 1958, the District Court denied this motion and certified that the appeal was not taken in good faith (R. 9). Thereafter, petitioner filed in the Court of Appeals a petition, an affidavit for leave to appeal *in forma pauperis* (R. 9). Petitioner was not brought to court to testify in his own behalf on the grounds set out in his motion to vacate, affidavits of an Assistant United States Attorney, Marie L. McCann, were filed in the District and Circuit Courts and used in opposition to the motions (R. 12-47). On July 21, 1958, the Court of Appeals denied the motion for leave to proceed *in forma pauperis* and ordered that the appeal be dismissed (R. 17).

On August 28, 1958, the Court of Appeals denied the motion "without prejudice to another motion in the District Court upon a different and more complete statement of facts" (R. 21).

On October 16, 1958, petitioner filed a new motion in the District Court to vacate sentence pursuant to 28 U.S.C. 2255 (R. 22-23). In this motion, petitioner alleged that the attorney, Mr. Altman, who had been appointed to represent him in a bank robbery charge against him in the Southern District of New York, had told him that if he cooperated with the Assistant United States Attorney, Mr. George S. Leisure, Jr., the government would ask for a suspended or very light sentence in the Southern District case; that petitioner withdrew his not guilty plea and pleaded guilty in the Southern District case; that Mr. Leisure confirmed the promises he had made to the petitioner's court appointed attorney; that Mr. Leisure asked petitioner to change his plea of guilty in the Eastern District case (the case involved); that petitioner told Mr. Leisure that he would do this if the government attorney in Eastern District case would make the same agreement as that made between petitioner and Mr. Leisure (R. 27). Petitioner further alleged that Mr. Leisure contacted Miss Marie McCann, the government attorney in the Eastern District case; that on June 29, 1955, Miss McCann and another government attorney came to see petitioner in prison; that Miss McCann agreed to ask that "a suspended sentence be given, or if sentence was imposed that a light sentence be imposed so as not to interfere with petitioner's chances in the Maryland case" (R. 27); that petitioner pleaded guilty in the Eastern District case on July 8, 1955; that on August 3, 1955, petitioner realized he had been tricked since the government attorney in the Southern District case had not kept his promise and was trying to get

petitioner more time"; that, therefore, on August 8, 1955, petitioner made a motion to withdraw his plea of guilty in the Eastern District case, since it was entered as a result of fear, coercion, or mistake; that the District Court's refusal of the motion to withdraw the plea, without allowing petitioner to give the reasons for the motion and without making any findings of fact or conclusions of law thereto was error (R. 31-32).

In a memorandum opinion of November 18, 1958, the District Court denied the motion to vacate sentence (R. 40). On December 10, 1958, petitioner filed an application for leave to appeal *in forma pauperis* from the District Court's order of November 18, 1958 (R. 46). The District Court denied this motion on December 14, 1958, by simply using the word "Denied" endorsed on the notice of appeal. On December 23, 1958, petitioner filed in the Court of Appeals a petition for leave to appeal *in forma pauperis* and an affidavit in support thereof (R. 43), the date December 10, 1958, on this motion is a printing error. An affidavit opposing this petition (R. 47), a Miss McCann, a government attorney, stated that "your deponent categorically denies that she ever made any such promises to the defendant and she has had a conversation with Mr. Leisure in which he indicated a willingness, if necessary, to submit an affidavit that he made no such promises" (R. 49). On March 5, 1959, the Court of Appeals denied petitioner's petition to proceed *in forma pauperis*, and granted the government's cross-motion to dismiss the appeal (R. 54). The petitioner at no time on any of his motions to vacate his sentence under 28 U.S.C. 2255 was afforded the opportunity to be present and testify in support of the allegations set out in his motions. It is this ruling of the Court of Appeals which petitioner complains of and upon which this court granted certiorari.

Statute 28 U.S.C. Section 2255, this section reads in part as follows:

"A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the grounds that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

"A motion for such relief may be made at any time."

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States' attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the Constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct a sentence as may appear appropriate."

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 63 Stat. 105.

Rule 11 of the Federal Rules of Criminal Procedure, 18 U.S.C.:

> "A defendant may plead not guilty, guilty, or, with the consent of the court nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refused to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

Rule 32(d) Federal Rules of Criminal Procedure, 18 U.S.C.:

> "Withdrawal of Plea of Guilty on a motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but, to current manifest injustice of the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Questions Presented

1. Where issues of fact within petitioner's knowledge are presented, and the files and records do not show that the petitioner is entitled to no relief, is the trial court obligated by the mandate of Title 28 Section 2255 to grant a prompt hearing thereon and order the petitioner to be produced in open court to testify as to the factual questions presented by his motion?

2. Did the trial court err in summarily denying petitioner's motion to withdraw his plea of guilty before imposition of sentence, without granting a prompt hearing

thereon and affording petitioner an opportunity to testify and adduce evidence in support of his motion?

ARGUMENT

In the District Court, petitioner attacked his judgment through a collateral issue involving constitutional violations. One of these violations being that the petitioner was induced to plead guilty by promises made to him by government agents. Namely, two United States' Attorneys assigned to the District Court for the Eastern District and Southern District of New York, who on the 29th day of June, 1955, came to the City Prison at 125 White Street, New York City, prior to the time that the petitioner changed his plea to guilty. During this visit the petitioner's attorney was not present nor was any other official or officers, including the F.B.I. The names of the government attorneys are as follows: Miss Marie McCann and Mr. Kenneth G. Sternberg.

The petitioner contends that his plea of guilty was induced by promises of leniency made by the above named Assistant United States Attorneys, as well as the Assistant United States Attorney for the Southern District of New York.

May the voluntariness of a plea of guilty be inquired into under Title 28 U.S.C. Section 2255?

This question was clearly answered in *Rusiere* v. *U. S.*, 10th Circuit, 1957, 249 F. 2nd 295 at pages 294-295 wherein the Court stated:

> "Fundamental standards of procedure in criminal cases require that a plea of guilty to a charge or charges contained in an indictment or information be entered freely, voluntarily, and without any semblance

> of coercion. A plea of guilty interposed as a result of coercion is not consistent with due process and therefore judgment and sentence imposed pursuant to such a plea cannot stand."

This ruling on a motion to vacate sentence was made in the *Rusière* case despite the fact that the petitioner therein had originally made his plea of guilty when he was accompanied by counsel of his choice. The same result was reached when the petitioner was represented by appointed counsel in the case of *Motley* v. *U. S.*, 5th Cir., 1957, 230 F. 2nd 110, and when the petitioner was not represented by counsel in *Shelton* v. *U. S.*, 1958, 358 U.S. 26, 78 S. Ct. 563. All of these cases were brought under Title 28 U.S.C. Section 2255.

The importance of the inquiry into the voluntariness of a plea of guilty was eloquently stated by Circuit Judges Richard T. Rives and John R. Brown, dissenting in *Shelton* v. *U. S.*, 246 F. 2nd 571 at page 580.

> "We are dealing here not with any logician's exercise in which we carve up these variables into neat little categories. We are dealing here not with whether the accused was in any way misled or imposed on. We are dealing with the fundamental requirement of our system that the machinery of the law in no way be used to bring about the guilty plea with its awful finality unless it represented the genuine free expressions of the prisoner's will. Anything less means, if history is our guide, that it is man and his freedom, not the unfortunate prisoner in the dock, who is imposed on."

Certiorari was granted in the above case, and the dissenters were sustained: *Shelton* v. *U. S.*, 1958, 358 U.S. 26, 78 S. Ct. 563.

Is the voluntariness of a plea of guilty such an issue as to necessitate producing the prisoner for a hearing?

If, as the petitioner in the instant case, has attempted to prove by the facts alleged in his motion to vacate sentence in challenging the voluntary character of his plea, and if a proceeding under Title 28 U.S.C. Section 2255, is the correct method of reaching such an issue, it remains to be determined whether the voluntariness of such a plea of guilty can be resolved on appeal or whether a hearing in the trial court, the petitioner should be produced for that hearing.

That the factual issue of the voluntariness of a plea in the trial court should not be determined upon appeal becomes apparent when we considered the purpose of the requirement of Title 28 U.S.C. Section 2255, that findings of fact and conclusions of law be made.

These purposes, as described by the 8th Circuit in *Michener* v. *U. S.*, 177 F. 2nd 422, at page 424, are as follows:

> (1) To enable the appellate court to determine the grounds upon which the trial court reached its decision.
>
> (2) To enable the defeated party to determine whether the case presents a question worthy of consideration by the appellate court;
>
> (3) To spare appellate court the necessity of searching the record to supply findings of fact.

It is evident that none of these purposes would be served by a naked conclusion to this honorable court as to the voluntariness of the plea. When such question of voluntariness was presented to the 5th Circuit under similar proceedings in the case of *Motley* v. *U. S.*, 230 F. 2nd 110 at page 111, it was said:

"This court has uniformly held, as has the Supreme Court, that where issues of fact within movant's knowledge are presented, the motion should not be disposed of without an adequate hearing. Applying that rule to the facts of this case, we think it clear that it was error for the District Judge to dispose of appellant's petition without a hearing on the issues tendered in his petition and supported in his traverse, that he was induced upon the promise of leniency to enter his plea."

Further reasons for requiring findings of fact from the trial courts on such issues were cited in *Bishop* v. *U. S.*, 223 F. 2nd 582, at page 592.

"Another reason for requiring findings here is suggested by our decision in Quinn v. U. S. (1952, 91 U.S. App. D.C. 344, 349, 203 F. 2nd 20, 25, certiorari granted, 1954, 347 U.S. 1008. 74 S. Ct. 861). There we were urged to affirm a criminal conviction on a ground not considered below. Although all the evidence bearing upon the ground was included in the record on appeal, we declined to make an original finding of fact, an important reason being—that one of the substantial rights accorded a criminal defendant by statute in the federal courts is the right of appeal. Were this court to affirm the conviction on a finding not considered below, the defendant would in effect be deprived of that right, for our finding, in the first instance, on the main issue, would be subjected to review only on the grant of certiorari by the Supreme Court; the finding which this court makes are, at least, doubtful yet they can be reviewed only on the grant of certiorari by the Supreme Court. Patently, this diminishes the right of appeal to the court of appeals which is specifically conferred by Section 2255."

Once again the views expressed in this dissenting opinion by Circuit Judge Davil L. Baselon were sustained on certiorari when the Supreme Court reversed the judgment of the circuit court and then ordered that a finding of fact be made in the trial court. (*Bishop* v. *U. S.*, 350 U.S. 961, 78 S. Ct. 440.) If it be granted that the issue of voluntariness should be the subject of a specific finding in the trial court, the further question remains as to whether the prisoner himself should be permitted to appear at such a hearing, as he has requested in his petition for motion to vacate and set aside sentence. The general rule as to when the defendant should be produced was stated in *Barrett* v. *Hunter*, 10th Cir., 1950, 180 F. 2nd 510, at page 514:

> "Under Section 2255, the court may entertain and determine the motion without requiring the production of the prisoner. We do not think it was intended by such provision to give the court an absolute discretion. Rather, we think the intention was to provide that the court may entertain and determine the motion without requiring the production of the prisoner when the motion or the records and files of the case conclusively show that the prisoner is not entitled to any relief, or where the presence of the petitioner or prisoner is unnecessary to afford him the relief which he is entitled, or where the only issues of law are presented.
>
> "But where the motion and any response thereto present material and substantial issues of fact requiring a hearing, generally, in the exercise of sound discretion, the court should require the production of the prisoner."

Not only does the petitioner's motion raise substantial issues of fact, but the respondent's motion acknowledged

and admitted the fact that they came to the City Prison and talked to the petitioner, without the petitioner having benefit of counsel present.

This acknowledgment of extra judicial proceedings, including the use of *ex parte* affidavits, upon the part of the government, was substantial enough in the eyes of the petitioner to require a hearing in open court. This general rule was affirmed in *U. S.* v. *Hayman*, 342 U.S. 205, 72 S. Ct. 263 (1952), at pages 219, 220:

> "The issues raised by respondent's motion were not determined by the files and records in the trial court. In such circumstances, Section 2255, requires that the trial court act on the motion as follows:
>
> > 'Cause notice thereof to be served on the United States attorney. Grant a prompt hearing thereon. Determine the issues and make findings of fact and conclusions of law with respect thereto.'
>
> "In requiring a hearing the section 'has obvious reference to the tradition of judicial proceedings.' Respondent, denied an opportunity to be heard, has lost something indispensable, however convincing the ex parte showing."

Again in *U. S.* v. *Hayman* at page 268 the court stated:

> "A prisoner in custody pursuant to a final judgment of a * * * court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the * * * court to proceed to judgment against him. * * * "

Again the court stated at page 273:

> "In order to secure respondent's presence in the sentencing court to testify or otherwise prosecute his motion is 'necessary or appropriate' to the exercise of its jurisdiction under Section 2255 and finds ample precedent in the common law. The express language of Section 2255 that a 'court may entertain and determine such motion without requiring the production of the prisoner at the hearing' negative any purpose to leave the sentencing court powerless to require production of the prisoner in an appropriate case."

The trial court permitted the government to file affidavits of assistant United States attorneys and considered those affidavits when the court decided the motion and denied it. So it cannot be said that the court did not hear evidence or require evidence on the motion. Certainly when the petitioner alleged that he was coerced into entering his plea of guilty he was the only person that had particular knowledge of the facts and circumstances and no judicial hearing could be had without his presence to testify in support of his motion. He likewise should have been afforded an opportunity to cross-examine the persons who made the affidavits and which affidavits were used against him by the government on his motion.

Did the district court have jurisdiction to sentence the petitioner?

The jurisdiction of federal courts (their power to adjudicate) is a grant of authority to them by the Congress. The lower federal courts are inferior courts of limited jurisdiction, that is with only the jurisdiction which Congress has prescribed when parties are brought before them in accordance with the requirement of due process; to determine the cause, and for such purpose to construe and apply the statutes under which they are asked to act.

Petitioner submits:

That at the time he made his motions to trial court, before imposition of sentence, to withdraw his plea of guilty and reenter his plea of not guilty it became the duty of the trial court to ascertain why the petitioner wished to withdraw his plea of guilty, by granting a hearing and make findings of fact, and conclusions of law thereto. However, the court summarily denied his motion to withdraw his plea of guilty without affording petitioner an opportunity to testify or advance any evidence as to why the plea should be allowed to be withdrawn. Rule 11 of the Rules of Federal Criminal Procedure, 18 U.S.C. provides that a court shall not accept a plea of guilty without first determining that the plea is made voluntarily with understanding of the nature of the charge. Rule 32(d) says that a motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended, but to correct manifest injustice, a court may permit the withdrawal of a plea of guilty to be made after sentence. Petitioner admits that a plea of guilty is itself a conviction and as conclusive as a verdict of a jury. That one entering such a plea may be held bound by it. And also that a defendant who enters a plea of guilty has no legal right to withdraw it. *Hoyt* v. *U. S.*, 252 F. 2nd 460, 10th Circuit and *Ellison* v. *U. S.*, 263 F. 2nd 395-396 and *United States* v. *Nigro*, 262 F. 2nd 783-787. However upon examination of these cases it will be found that inquiry was made as to whether or not there were any substantial grounds for the withdrawal of the plea of guilty. The courts at least afforded the petitioners in those cases the right to a hearing in which it was determined from evidence that there was no basis or justification for the withdrawal of the plea of guilty. In the instant case the court summarily denied the motion in open court without a hear-

ing and without listening to any evidence or affording the petitioner a chance to say a word in behalf of his motion to withdraw his plea. See *Townsend* v. *Burke*, 334 U.S. 736, 738, 68 S. Ct. 1252, 1254.

> "Withdrawal of a plea of guilty will be permitted if it clearly appears that the plea was entered by defendant as a result of failure, coercion or mistake. The denial of a court to allow withdrawal of a plea of guilty is a reversible error. It is necessary that the accused show in support of his motion that the plea of guilty should not be allowed to stand against him because of some reason existing when it was entered, but for which he could not have entered the plea, and that reason must amount to fraud or an imposition upon him or a misapprehension of his legal rights."

It is true that an application for leave to withdraw a plea of guilty is addressed to the sound discretion of the trial court. *Callahan* v. *U. S.*, 10th Cir., 35 F. 2nd 633, 634; *U. S.* v. *Mignoga*, 2nd Cir., 157 F. 2nd 839, 840, certiorari denied, 330 U.S. 830, 67 S. Ct. 863, 91 L. ed. 1278. Certainly in arbitrary denial of a motion to withdraw a plea of guilty without affording petitioner the chance to present his evidence, state his reasons for such withdrawal, would constitute an abuse of discretion; that such denial also denied the appellant trial by jury under the constitution of the United States; and violated due process of law. That such a violation is fatal to the courts' jurisdiction (the power to adjudicate); which renders the sentence which was imposed upon the petitioner void. This view is supported by *Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45 and *Glossear* v. *United States*, 315 U.S. 60.

It may well be argued by the government herein that Section 2255 is not available to petitioner because even if

he were successful it would not restore him to his immediate liberty. However, the true rule in respect to the use of 2255 has been stated in the case *Heflin* v. *United States*, 79 S. Ct. 451; 358 U.S. 415. Wherein the court at page 453 stated:

> "A majority however, are of the view, shared by several courts of appeals, that Section 2255 is available only to attack a sentence under which a prisoner is in custody."

Clearly in this case the petitioner is actually serving the sentence from the Eastern District of the United States because that sentence when it was imposed runs concurrently with the sentence he was given in the United States District Court of Maryland and it cannot by any stretch of the imagination say that he is not actually serving that sentence. So that the requirements set out in *Heflin* v. *United States* has been met by the petitioner herein. See also, *Nishimoto* v. *Nagle*, 44 F. 2nd 304.

The petitioner filed a motion in the nature of *coram nobis* in the District Court of Maryland which was denied; Crim. 23017 and 23024 without finding of fact or conclusion of law. Appeal to the 4th Circuit Court of Appeals was granted by the District Court *in forma pauperis*. However, the circuit court of appeals denied petitioner the right to appeal *in forma pauperis*. Petition for writ of certiorari is now pending in this court, No. 488, Misc. The contention involved is as follows:

> That he only committed one act in that district and that under two separate statutes he was indicted. It is his contention that the government should have been required to elect under which statute they intended to prosecute him and since they failed to do so and charged him under two separate statutes and im-

posed two separate sentences that their failure to elect renders only the sentence on the five year conviction ~~invalid~~ valid.

If the petitioner is successful in this case then the twenty year sentence imposed upon him in the District of Maryland would be void and the five year sentence has now been fully served. By the same reasoning if the petitioner herein is granted the right to go back to the Eastern District of New York and by proper evidence and proof show that his plea of guilty was entered into by coercion and that sentence should be set aside and vacated then since the Maryland twenty year sentence was void and the five year sentence has been fully served; he would not be serving any sentence under the Maryland cases; and if he prevailed in the Eastern District of New York he would be entitled to his freedom, this because the other sentence he received in the Southern District of New York would fall by the same standards.

CONCLUSION

The appellant's motion to vacate the sentence is grounded upon the facts that the existence of duress, coercion and undue influence rendered his plea of guilty involuntary; that the court's refusal to allow the withdrawal of his plea of guilty before imposition of sentence without making a finding of fact rendered the sentence imposed null and void. That the motion of the petitioner filed to vacate and set aside his sentence contained therein allegations of fact which only he could testify to and that under 2255 *supra* his presence was required and he should have been afforded an opportunity to testify in behalf of his motion; that findings of fact, conclusions of law should have been made at such hearing; that the word hearing as used in

the statutes requiring prompt hearing on a motion to set aside a sentence, has reference to tradition of judicial proceedings, and that a petitioner denied an opportunity to be heard in such proceeding has lost something indispensable, however convincing the *ex parte* showing. That the question of voluntariness is an issue of fact within petitioner's knowledge and hence should not be disposed of by the trial court without the petitioner's presence.

It is earnestly submitted that in view of these conclusions, the order of the district court denying petitioner's motion to vacate sentence should be reversed and the case remanded to the trial court for findings of fact on the voluntariness of petitioner's plea of guilty, with the appellant being present at the hearing of the motion to vacate and set aside the sentence; that otherwise the petitioner will be denied his day in court and deprived of his constitutional rights in violation of the provisions of 28 U.S.C. Section 2255.

Respectfully submitted,

HOMER DAVIS
Attorney for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 153

CLARENCE DUKE MCGANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decisions of the District Court (R. 5, 40-42) and the orders of the Court of Appeals (R. 17-18, 21, 54) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1959 (R. 54). The petition for a writ of certiorari was filed on March 23, 1959, and was granted on June 29, 1959 (R. 55). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the post-sentence remedy provided by 28 U.S.C. 2255 is applicable when the petitioner cannot

obtain release from custody, or other advantage, even if he were successful.

2. Whether the petitioner has alleged sufficient facts to entitle him to a hearing on his contention that his plea of guilty was improperly induced.

STATUTES INVOLVED

28 U.S.C. 2255 provides:

FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that

the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

The petitioner, who is now serving a 20-year sentence for bank robbery imposed by the Maryland District

Court and also a concurrent 20-year sentence for bank robbery imposed by the District Court for the Southern District of New York, filed a motion under 28 U.S.C. 2255, attacking the validity of a concurrent 12-year sentence for bank robbery imposed by the District Court for the Eastern District of New York. It is the denial of the motion as to this latter sentence, and the dismissal on the government's motion of the petitioner's second appeal to the Court of Appeals, which are under review in this proceeding.

A. *The 20-year sentence from Maryland (imposed in September 1954) now being served*

Petitioner's Maryland sentence is not here under attack. On August 13, 1954, the petitioner and two others—Earl Kill Smith and Henry John Foster—robbed a bank at the Andrews Air Force Base of over $124,000. The petitioner was arrested as he was fleeing. See *United States* v. *McGann*, 150 F. Supp. 463, 464 (D. Md.) Three indictments were returned. One charged bank robbery with a dangerous weapon, a second the interstate transportation of a stolen motor vehicle, and the third robbery from a person within the special territorial jurisdiction of the United States. The trial court appointed two attorneys to represent the petitioner. After preliminary medical reports as to the petitioner were received, the petitioner, with his two appointed counsel present, entered a plea of guilty as to all the offenses. On September 20, 1954, he was sentenced to 20 years on the bank robbery indictment and 5 years on each of the other offenses—all to be served concurrently. No appeal was taken.

United States v. *McGann*, 161 F. Supp. 629 (D. Md.)

Petitioner has since attacked this sentence collaterally at least four times. First, on June 5, 1957, he filed a petition for a writ of habeas corpus which was treated as a motion under 28 U.S.C. 2255. He claimed the indictment was bad because the institution robbed was not an insured bank, but only an Air Force Base bank. The Court of Appeals affirmed *per curiam* the denial of this motion. *McGann* v. *United States*, 249 F. 2d 431 (C.A. 4).

His second petition for release on habeas corpus was denied May 2, 1958, by the district judge. The petitioner there claimed double jeopardy in that the two robbery indictments constituted the same offense. The court found that the offenses were not the same and in any event that petitioner was not entitled to release from the longer of the concurrent Maryland sentences. See *United States* v. *McGann*, *supra*, 161 F. Supp. at 633 (D. Md.). Although granted permission to appeal in forma pauperis, the petitioner chose to file a third attack. See *McGann* v. *United States*, 261 F. 2d 956, 958 (C.A. 4).

The third motion was substantially the same as the second, and was accordingly denied. On appeal, this was affirmed both on the merits and procedurally. The court also found that, even if the 5-year sentence were invalid, the 20-year sentence for bank robbery was valid. *McGann* v. *United States*, 261 F. 2d 956 (C.A. 4). This Court denied a petition for a writ of certiorari. 359 U.S. 974.[1]

[1] Petitioner's fourth attack raised the same contention but under the label of coram nobis. This series is not officially reported. See No. 488 Misc., this Term, now pending in this Court.

B. *The 20-year New York sentence (imposed on August 3, 1955) running concurrently with the Maryland sentence.*

The sentence from the Southern District of New York is also not under attack in the present case. On August 12, 1954, the petitioner and the same two confederates robbed a bank in Harlem in the Southern District of New York. On June 28, 1955, the petitioner pleaded guilty and on August 3, 1955, was sentenced to 20 years' imprisonment to be served concurrently with the 20-year sentence imposed in Maryland. On both dates he was represented by his court-appointed counsel, Samuel W. Altman, Esq.—"a lawyer with many years' experience at the federal criminal bar": *United States* v. *McGann*, 245 F. 2d 670, 671 (C.A. 2).

He has since made three attacks on this sentence. First, on August 11, 1955, he filed a petition for a writ of habeas corpus claiming that his plea was under undue duress and hardship. This was denied on September 13, 1955, and no appeal was taken. 245 F. 2d at 671.

On December 12, 1955, the petitioner moved to withdraw his plea of guilty under Rule 32(d) of the Federal Rules of Criminal Procedure. He claimed that his plea was made under undue influence and coercion of his court-appointed counsel. This motion was denied on December 19, 1955, and no appeal was taken. *Id.* at 671.

On January 30, 1956, he filed his third post-conviction motion. This was under 28 U.S.C. 2255. He claimed that his court-appointed counsel had told him

that the United States Attorney would ask that no sentence be imposed and that the United States Attorney had confirmed these promises. This was in conflict with affidavits filed by the former court-appointed attorney and the prosecutor. The District Court denied the motion on the basis of the files and records.[2] On appeal, the Court of Appeals for the Second Circuit on June 14, 1957, held there was no occasion to consider the merits of petitioner's claim, since a motion under 28 U.S.C. 2255 is not available to determine a question which could not result in the release of the petitioner. *United States* v. *McGann*, 245 F. 2d 670, 672.

C. The 12-year sentence (imposed on August 8, 1955), now under attack, running concurrently with the two previous 20-year sentences.

The present action relates to a 12-year sentence imposed by the District Court for the Eastern District of New York. On April 21, 1954, the petitioner and his confederate, Earl Kill Smith, committed an armed robbery at the Veterans Administration Hospital, Brooklyn. He was indicted in one count for this offense under 18 U.S.C. 2111—robbery within the special territorial jurisdiction of the United States (R. 12-13). On May 9, 1955, the trial court assigned Mr. Benjamin Glass as counsel. After a conference with counsel, the petitioner pleaded not guilty (R. 13). On July 8, 1955, with counsel present and having been warned of his rights, the petitioner voluntarily withdrew his plea

[2] Thereafter, there was a dismissal of the appeal which this Court reversed *per curiam* for consideration by the Court of Appeals on the merits of the appeal. *McGann* v. *United States*, 352 U.S. 904.

of not guilty and entered a plea of guilty (R. 41). On August 8, 1955, with counsel present, the court denied the petitioner's motion to withdraw his plea and sentenced him to 12 years, to be served concurrently with the previous 20-year Maryland sentence (R. 48).

On October 30, 1957, the petitioner made a motion for reduction of sentence, which was denied on November 4, 1957 (R. 48).

On April 7, 1958, the petitioner filed a motion under 28 U.S.C. 2255, collaterally attacking the 12-year sentence (R. 1-4). He claimed that his plea of guilty had been entered under duress and that the trial court committed reversible error in refusing to allow him to withdraw the plea (R. 2-3). The trial court denied the motion on April 8, 1958 (R. 5), noting that petitioner's claim of duress was not amplified and further that the

> record shows that defendant was fully informed and advised of his rights, and had the benefit of counsel, before acceptance of the plea.

The petitioner sought leave from the District Court to appeal in forma pauperis (R. 6-7). This was denied for the reasons stated in the memorandum opinion and on the ground "that the Appeal is not taken in good faith" (R. 9).

Leave to appeal in forma pauperis (R. 9-10) was denied in the Court of Appeals (R. 17),[3] but on petition

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[3] The petitioner's request for counsel was based upon the theory that, since leave to appeal in forma pauperis had been granted his co-defendant Earl Kill Smith, petitioner was entitled, as of right, to the same (R. 11). Later, the petitioner claimed that the *Smith* case (*United States* v. *Smith*, 257 F. 2d 432 (C.A. 2), certiorari denied, 357 U.S. 926) was not like his (R. 19).

for rehearing the court noted that the denial was without prejudice to another motion in the District Court upon a different and more complete statement of facts (R. 21).

Thereafter, the petitioner filed another motion in the District Court for the Eastern District of New York, also under 28 U.S.C. 2255 (R. 22-23). In this motion he claimed that the trial court committed reversible error in not allowing him to withdraw his plea of guilty (R. 24). He further claimed that his plea was coerced because his lawyer in the Southern District of New York had told him that the government would ask for a light or suspended sentence if he pleaded guilty (R. 26); that he changed his plea in the Southern District and then the United States Attorney for the Southern District "confirmed" the promise and requested that the petitioner also change his plea in the Eastern District (R. 27); that Miss Marie McCann, Assistant United States Attorney for the Eastern District, was called and that she made the same agreement (R. 27). He alleged that the reason he wanted to withdraw his guilty plea in the Eastern District was because the United States Attorney in the Southern District had not kept the promise on his sentence in that district (R. 31-32).

The government filed an affidavit by Miss Marie L. McCann, an Assistant United States Attorney for the Eastern District of New York (R. 35-39). She called attention to the fact that the petitioner had unsuccessfully litigated the "promise questions" in the Southern District of New York and was now seeking to relitigate the same issues in the Eastern District (R. 37). She

categorically denied that she or the other Eastern District Assistant United States Attorney had made any promise of a suspended sentence to the petitioner when they saw him prior to sentence (R. 38). She stated that Mr. Leisure, formerly an Assistant United States Attorney in the Southern District, had stated his willingness to submit an affidavit that he had not promised the petitioner a suspended sentence (R. 38).

On November 18, 1958, the trial court denied petitioner's motion and filed a memorandum (R. 40-42), indicating that the substance of the allegations had been previously urged (R. 40) and that, while represented by counsel, petitioner had changed his plea to one of guilty (R. 41):

> The record shows that he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent.

The court noted that, even if the district attorneys had agreed to ask for lighter sentences, this could have added nothing to petitioner's legal rights or altered his status in court with respect to fixing the punishment (R. 42). The court also noted that petitioner's Maryland sentence would be unaffected by the proceedings (R. 42).

The petitioner again applied to the District Court for leave to appeal in forma pauperis which was denied on December 14, 1958 (R. 46). He next petitioned the Court of Appeals for leave to appeal in forma pauperis (R. 43-44). The government moved to dismiss the appeal as completely without merit and frivolous on its

face (R. 47-50). On March 5, 1959, the Court of Appeals denied the petitioner's motion and granted the cross-motion to dismiss the appeal (R. 54).

SUMMARY OF ARGUMENT

I

The post-sentence remedy in 28 U.S.C. 2255 is not applicable to an attack upon a concurrent sentence where the claimant cannot be released or secure any benefit from the proceeding, even if successful.

A. 1. The petitioner is here seeking to attack, by a motion under 28 U.S.C. 2255, a 12-year sentence imposed in the Eastern District of New York. He is also now serving two 20-year concurrent sentences imposed in other districts (Maryland and the Southern District of New York). As long as these two 20-year sentences stand, vacation of the 12-year sentence, which runs concurrently with the 20-year sentences, can result in no benefit to the petitioner. Refusal to consider his challenge to the 12-year sentence would accord with the policy of a long line of decisions in this Court that appellate courts need not review the correctness of each count of multiple convictions, even on direct review, where there are sufficient counts to warrant the sentence. Furthermore, vacation of the 12-year sentence would have no effect on petitioner's total sentence, nor parole, nor computation of good time.

2. If the petitioner could gain no relief in any jurisdiction solely because of other outstanding concurrent sentences, he could then resort to habeas corpus as provided in Section 2255 where the motion remedy is inadequate. This petitioner does not have such a problem because he has not been denied relief on his 20-year

Maryland sentence because of either New York sentence, but solely on the merits.

B. The language and history of 28 U.S.C. 2255 indicate that petitioner is not entitled to seek relief under that section.

1. The rationale of this Court's recent ruling in *Heflin* v. *United States*, 358 U.S. 415, applies to the concurrent sentences here—*i.e.*, unless the prisoner can claim "the right to be released" if his motion is successful, the statute is inapplicable.

2. a. The Judicial Conference, which proposed this legislation, deliberately changed the wording of the bill from making the new remedy applicable to any judgment that is "void" to having it applicable instead only where one can claim "the right to be released".

b. The insertion of the sentence in Section 2255 to the effect that "A motion for such relief may be made at any time" did not change the requirement that the statute was only to be applicable to those claiming release. At best, it only made more certain that the expiration of the term or that lapse of time was not a bar to the applicability of the remedy.

3. The judicial interpretation of Section 2255 has been uniform in not extending the statute to one serving concurrent sentences who cannot claim the right to release even if successful. This follows the practice of not extending habeas corpus to one who could not gain release. Since Section 2255 merely affords the same rights as habeas corpus in another forum (*United States* v. *Hayman*, 342 U.S. 205, 219), the lower courts

have refused to extend the scope of this section where the applicant could not be released even if successful.

II

In any event, the petitioner has not alleged sufficient facts to entitle him to a hearing under 28 U.S.C. 2255.

A. The record shows that he entered his plea of guilty while represented by an attorney and that he was informed that the court had power to sentence him to imprisonment, without mention of its extent. The petitioner does not challenge this. In these circumstances his claim that an Assistant United States Attorney told him that she would ask for a light or suspended sentence is not sufficient to overcome the record of a voluntary plea of guilty, and to require a hearing. Petitioner's allegations, even if true, would not amount to coercion or undue influence with respect to his plea.

B. Moreover, the trial court denied petitioner's motion to withdraw his guilty plea. Petitioner claims that this denial was incorrect, but the proper way to test this claim would have been by appeal. The petitioner had a lawyer and was himself competent to challenge this action. Actually, the record suggests that the petitioner deliberately decided not to appeal, was satisfied with his sentence, and therefore purposely abandoned any claim that his guilty plea was not voluntary. He should not now be allowed to raise this same issue on collateral attack.

ARGUMENT

I

The Post-Sentence Remedy in 28 U.S.C. 2255 Is Not Applicable to an Attack Upon a Concurrent Sentence Where the Claimant Cannot Be Released or Secure Any Benefits from the Proceeding, Even If Successful

The petitioner is here seeking to attack, by a motion under 28 U. S. C. 2255, a 12-year sentence imposed for robbery in the Eastern District of New York. He is also now serving two 20-year concurrent sentences imposed in other districts (Maryland and the Southern District of New York). It is the government's position that in this situation the petitioner cannot gain any practical relief as a result of this proceeding, and hence that the remedy of 28 U. S. C. 2255 is not now available to attack the 12-year sentence. This conclusion stems not only from the limitations in the statute itself, but also from the broad policy against requiring the courts to consider issues which cannot result in benefit to the petitioning litigant.

A. This proceeding does not lie because petitioner can obtain no relief

1. At the time the sentence here under attack was imposed by the District Court for the Eastern District of New York on August 8, 1955, petitioner was already under two 20-year sentences—one imposed September 20, 1954, by the District Court for Maryland and one imposed August 3, 1955, by the District Court for the Southern District of New York. The present sentence of 12 years runs concurrently with those 20-year sentences, and, so long as those two sentences stand, vacation of the 12-year sentence can result in no benefit to

petitioner. There was thus no occasion for the courts below to consider petitioner's attack upon that sentence.

This is in conformity with the well-established judicial policy of not deciding issues which can have no material effect on the rights or status of the litigants. This Court in a long line of decisions has ruled that it will not review the correctness of each count of multiple convictions, even on direct review, when there are sufficient counts to warrant the sentence. *Locke* v. *United States*, 7 Cranch. 339, 344; *Clifton* v. *United States*, 4 How. 242, 250; *Snyder* v. *United States*, 112 U. S. 216, 217; *Claassen* v. *United States*, 142 U. S. 140, 146; *Pierce* v. *United States*, 252 U.S. 239; *Brooks* v. *United States*, 267 U. S. 432; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Lawn* v. *United States*, 355 U.S. 339, 359. Thus, if the petitioner had received his concurrent sentences of two 20-year terms and one 12-year term all at one time in one court there would be no reason to review *only* the 12-year term, even on direct appellate review. Certainly, there should be less reason to allow such a review, many years after, on collateral attack.

Petitioner can gain no present material advantage by this proceeding, regardless of results, except perhaps a few weeks outside the penitentiary to attend a hearing. Since this 12-year sentence was imposed after the two longer sentences, there can be no claim, such as is sometimes made as to multiple counts, that vacation of this sentence might affect the total length of the others. Cf. *United States* v. *Hines*, 256 F. 2d

561 (C.A. 2). With the other two longer sentences outstanding, this conviction can have little or no effect on petitioner's status as a recidivist if he should commit another crime after release. Cf. *United States* v. *Morgan*, 346 U.S. 502, where the claimant was serving subsequent sentences as a multiple offender.[4] Also, with the other two longer sentences outstanding, the sentence could have no effect in deportation even if petitioner were an alien. Cf. *Fiswick* v. *United States*, 329 U.S. 211. And, unlike the situation in *McNally* v. *Hill*,

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[4] Whether this conviction can have any effect at all for purposes of application of various state habitual criminal statutes contains too many variables to be susceptible of precise forecasting. The whole question is, of course, based upon an assumption (not necessarily warranted) that, upon release, the petitioner would commit another crime and be convicted in a state. On this assumption, the first variable would be whether all or part of the 5 federal indictments against petitioner would be considered as previous crimes by the particular state. Another would be whether this petitioner would be treated differently because he pleaded to these indictments in three jurisdictions rather than in one jurisdiction under Rule 20 of the Federal Rules of Criminal Procedure, and in any event received concurrent sentences. Finally, we may also find a difference in treating prior convictions within a particular state, based upon whether one is a second or third offender as compared to a fourth offender. See generally 5 A.L.R. 2d 1080; 24 A.L.R. 2d 1247; 5 Wharton's *Criminal Law and Procedure* (1957) 435-441.

Generally, and in the limited number of federal recidivist statutes relating to prior convictions for similar offenses (of which robbery is not one), there must be a prior adjudication of guilt and another offense after the prior conviction and service of the prior sentence. *Singer* v. *United States*, 278 Fed. 415 (C.A. 3), certiorari denied, 258 U.S. 620; *Gonzalez* v. *United States*, 224 F. 2d 431 (C.A. 1); *Biddle* v. *Thiele*, 11 F. 2d 235 (C.A. 8). Under this pattern of legislation, the sentence here could have no separate effect even if petitioner became subject to a state habitual criminal statute, so long as his two other sentences remained outstanding. The sentence at issue would add nothing.

In other states it is possible that the conviction at issue would be counted separately on the theory that separate crimes were

293 U.S. 131, or *Heflin* v. *United States*, 358 U.S. 415, petitioner cannot even claim that this decision will have any legal effect upon possible parole (see 18 U.S.C. 4202; *Clark* v. *United States*, 267 F. 2d 99, 102 (C.A. 4)), or on computation of good time. 18 U.S.C. 4161. This judgment thus has no present practical or legal significance for petitioner, and there is no reason for the courts to consider his attacks on it, until such time as some real benefit to him may result from a determination of the validity of his 12-year sentence.

2. Under our view, a prisoner serving two or more concurrent sentences imposed by different district courts, who wished to obtain release by attacking all his sentences, would not be precluded from relief. If the respective district courts refused to consider applications under Section 2255 because of the other concurrent sentences, the prisoner could resort to habeas corpus in the district of his confinement under the provisions for such action in 28 U.S.C. 2255 (*supra*, p. 3) where "the remedy by motion is inadequate or ineffective to test the legality of his detention." However, this is *not* this petitioner's problem, as he has not been denied relief from his first 20-year sentence in Maryland, either in the District Court or the Court of Appeals for the Fourth Circuit, on the basis of the contention that either New York sentence remained to be served.[5]

committed. *State* v. *Vaccaro*, 200 La. 475; *Terwilliger* v. *Turk*, 281 N.Y.S. 527 (Sup. Ct.); *People* v. *Warden of Auburn State Prison*, 84 N.Y.S. 2d 43 (Sup. Ct.); *People* v. *Gorney*, 103 N.Y.S. 2d 75 (Sup. Ct.). On the other hand, see *People* v. *Spellman*, 272 N.Y.S. 68 (Sup. Ct.); *State* v. *Mayo*, 90 So. 2d 455 (Sup. Ct. Fla.).

[5] The Maryland sentence, which was imposed first, was not in terms concurrent to any other sentence. No question as to pe-

B. *The language and history of 28 U.S.C. 2255 indicate that petitioner is not entitled to seek relief under that Section*

This Court recently held in *Heflin* v. *United States*, 358 U.S. 415, that relief under 28 U.S.C. 2255 is not available to a prisoner who has not yet begun to serve the sentence he is attacking. The considerations which led the Court to reach that conclusion apply as well to the situation here. The background, history, and judicial interpretation of Section 2255 likewise support that view.

1. The pertinent language of the statute is:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.

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tioner's lack of standing to attack the Maryland sentence was ever raised because of the outstanding New York sentences.

The possibility that the New York sentence of 20 years, which was imposed almost one year after the Maryland sentence, could have had the effect of extending the petitioner's total sentence was called to the sentencing judge's attention by the concurring judge in *United States* v. *McGann*, 245 F. 2d 670, 672-673 (C.A. 2), and resulted in an amended order of commitment.

There is no question that, as he argues, petitioner is now in custody under the sentence which he seeks to attack, and to that extent his case is factually different from the case where a prisoner seeks to obtain relief from a consecutive sentence which he may not yet be serving, *e.g. Hoffin* v. *United States*, *supra*. However, the rationale of the ruling on the consecutive sentence problem also applies to the concurrent sentences here—unless the prisoner can claim "the right to be released" if his motion is successful, the statute forbids its use as a post-trial remedy. The language, which was deliberately chosen by the Judicial Conference (see *infra*, pp. 20-21, 48), does not say that the prisoner is entitled to use this remedy wherever he claims the right to be released from the particular sentence he challenges. To the contrary, it reads "claiming the right to be released"—without qualification. As in habeas corpus, the prisoner must demand his freedom. Since petitioner cannot claim the right to be released even if the 12-year sentence he is attacking were to be vacated, because he is concurrently serving two longer sentences, the statute is inapplicable to this case.

2. The general background of Section 2255 was canvassed in *United States* v. *Hayman*, 342 U.S. 205, with specific reference to the various proposed bills and the proceedings of the Judicial Conferences of the United States which inaugurated this form of action. The history is further detailed in an appendix to the government's brief in *Hayman*, which reprints the reports and memoranda submitted to and by the Judicial Conference in connection with the proposal. See the government's brief in No. 23, O.T. 1951, pp. 87-186. We

have reprinted the pertinent parts as an Appendix, *infra*, pp. 33-56. For the question at issue here, it is necessary only to trace the source and the possible purpose of the key language quoted above.

a. In the first report of the special committee of the Judicial Conference the draft of the present statute (then Section 2 of the jurisdictional or "A" statute) began:[6]

> SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered.

The report of the Committee in commenting on this section stated (App. *infra*, pp. 38-39):

> Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitu-

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[6] See Report of the Habeas Corpus Committee, submitted at the 1943 session of the conference, Appendix, *infra*, pp. 33-46, 43. While the Committee presented two versions of Section 2, they were identical with respect to the language here quoted.

> tional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston*, 313 U.S. 342, 349. All members of the Committee agree on this part of the section.

Thus, "custody" under the judgment to be attacked was considered essential from the outset. This appears from the express words used by the Committee in the proposed statute and the unanimous comment of its members. The citation of *Holiday* v. *Johnston*, 313 U.S. 342, 349, is also significant because in that case, this Court affirmed the doctrine of *McNally* v. *Hill*, 293 U.S. 131, that habeas corpus could not be used where a successful claimant would not be entitled to immediate release. The Court ruled that since *Holiday* had a consecutive sentence, under which he was not yet in custody, resort to habeas corpus was premature.[7]

On the day before the 1943 meeting of the Judicial Conference, after receiving letters from various judges, the Committee met and prepared a Supplemental Report (App. *infra*, pp. 46-48). Of present significance was the elimination of the words "that the judgment is void because", and substitution of the words "the right to be released on the ground that the judgment has been obtained" (App. *infra*, p. 48).

As thus adopted and recommended by the Judicial Conference the bill read in pertinent part (Report of the Judicial Conference, 1943, p. 24):

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[7] The Court did hold that he could move to vacate his sentence. This is in conformity with the present use of Rule 35, Federal Rules of Criminal Procedure; *Heflin* v. *United States*, 358 U.S. 415; *Prince* v. *United States*, 352 U.S. 322.

> Sec. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, *claiming the right to be released* on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. [Emphasis added.]

The Committee stated (Report of the Judicial Conference, 1943, p. 22):

> The jurisdictional bill, statute "A", was substantially amended by the committee just prior to the Conference and received additional amendments at the Conference.[8]

This history indicates that, prior to consideration by the whole conference, the scope of the proposed statute was deliberately changed so as to confine its operation to situations where the right to release was claimed. It was not made applicable to all void judgments. To interpret the statute as applicable to all void judgments, regardless of the prisoner's right to be released, would be to read it as it was prior to this explicit change, not as it was ultimately proposed and enacted.

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[8] A variant of this proposal was then submitted to Congress with interim additions not here relevant. While this was submitted to the House (H.R. 4233) and Senate (S. 1451) of the 79th Congress, 1st Sess., and also passed the Senate (S. 20) in the 80th Cong., 2d Sess., 94 Cong. Rec. 7709-7710, June 40, 1948, the actual enactment took place in the codification of Title 28, 62 Stat. 967.

b. There was one further change which may be thought material. Between the time of the final proposal and the enactment of the measure as Section 2255 of Title 28, the following words were eliminated at the end of the first sentence of Section 2, *infra*, p. 43:

> notwithstanding the expiration of the term at which such judgment was entered.

A one-sentence paragraph was substituted:

> A motion for such relief may be made at any time.

While we have found no explicit statement in the available historical material which explains why this change was made, several reasons are possible. A provision that a motion for relief may be made at any time is an affirmative (and therefore more positive) grant than the negative phrase "notwithstanding the expiration of the term". It may have been substituted merely as a more appropriate manner of expressing the lack of a legal time limitation. It is also more consonant with modern criminal practice since the significance of the legal "term" and the usual legal implications of the expiration of the term have been abolished. Rule 45(*c*) of the Rules of Criminal Procedure.

Another consideration which may have some bearing is the fact that, while the original proposals were pending, another somewhat similar bill was presented to Congress, H.R. 6723, 79th Cong., 2d Sess. This bill provided (in part):

> Any motion under this section shall be filed within one year (a) after the effective date of this Act, or (b) after the discovery by movant of

> facts upon which he relies for relief, or (c) after any change of law, by statute or controlling decision, occurring subsequent to imposition of sentence and upon which he relies for relief. The burden of establishing that the motion was timely filed shall be upon the movant; and failure to file such motion within such time shall bar relief by the writ of habeas corpus unless it appears that it would not have been practicable to determine petitioner's rights to discharge from custody on such motion if the motion had been filed in time.
> * * *

This imposition of a time limit later evoked the unanimous disapproval of the Committee of the Judicial Conference.[9] The present wording may therefore have been designed to make clear that no specific time limitation was applicable to the new remedy.

In any event, we think the words in context can only have meaning in relation to the remedy provided—*i.e.*, "such relief"—and hence mean no more than that one in custody who claims the right to release can invoke the remedy at any time during that period. So long as a prisoner is in the category of one who claims the right to release, time alone has no effect upon his right to invoke the statute. But the addition of this sentence on "time" did not eliminate either the requirement of custody or the prerequisite of a claim to the right to be released.

3. Interpretation of Section 2255 has been uniform in not extending the statute to a prisoner with concur-

[9] See Report of the Committee submitted at the 1947 Special Session of the Conference. App., *infra*, pp. 49-56, at 49-50.

rent sentences who cannot claim the right to release even if successful. This is in accord with the prior habeas corpus procedure, and, as we have pointed out, is consistent with the general rule that courts will not decide matters which have no material effect upon the rights of the litigant.

The use of habeas corpus for a matter not affecting the claimant's detention has regularly been denied. This Court unanimously held in *McNally* v. *Hill*, 293 U.S. 131, 137-138:

> * * * There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such a use has been found in the commentaries on the English common law. Diligent search of the English authorities and the digests before 1789 has failed to disclose any case where the writ was sought or used, either before or after conviction, as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release.

Accord: *Eagles* v. *Samuels*, 329 U.S. 304, 307; *Holiday* v. *Johnston*, 313 U.S. 342, 349. See also *Ex Parte Watkins*, 3 Pet. 193, 202; *In re Boardman*, 169 U.S. 39, 43. Cf. *Chandler* v. *Fretag*, 348 U.S. 3.

The basic purpose of Section 2255 was to "minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum". *United States* v. *Hayman*, 342 U.S.

205, 219. It should follow that the remedy given by Section 2255 for attacking a judgment is available only where it can result in release.[10]

The lower courts have refused to extend the scope of Section 2255 to the case where the claimant was confronted with concurrent sentences and therefore could not be released even if successful. *Miller* v. *United States*, 256 F. 2d 501, 502 (C.A. 9); *Toliver* v. *United States*, 249 F. 2d 804 (C.A. 9); *United States* v. *McGann*, 245 F. 2d 670, 672 (C.A. 2); *Hoffman* v. *United States*, 244 F. 2d 378, 380-381 (C.A. 9); *Duggins* v. *United States*, 240 F. 2d 479, 482-483 (C.A. 6); *Williams* v. *United States*, 236 F. 2d 894 (C.A. 9), certiorari denied, 352 U.S. 982; *Oughton* v. *United States*, 215 F. 2d 578, 579 (C.A. 9), certiorari denied, 352 U.S. 975. See also *Winhoven* v. *United States*, 209 F. 2d 417, 418 (C.A. 9), dismissing an appeal from *United States* v. *Winhoven*, 14 F.R.D. 18.

In summary—the words, history, purpose, and judicial interpretation all indicate that the post-sentence remedy under Section 2255 is not applicable unless success can result in release. It was intended as a substitute for habeas corpus and the framers seem to have chosen deliberately to keep its confines within those of habeas corpus. Moreover, aside from the specific limitations of the statute's wording and purpose, the remedy ought not to be invoked where the judgment attacked has no present (and in all likelihood no future) impact on any rights of the petitioner.

[10] Section 2255 also provides for correcting a sentence subject to collateral attack. But this involves release, even if temporary, since any continued custody is not under the sentence being attacked. Cf. as to habeas corpus, *In Re Bonner*, 151 U.S. 242.

II

The Petitioner Has Not Alleged Sufficient Facts to Entitle Him to a Hearing Under 28 U.S.C. 2255

The petitioner claims he has alleged sufficient facts to entitle him to have a hearing under Section 2255. Assuming, arguendo, that this question is reached, we think that it appears from the record that the petitioner was not entitled to a hearing on his collateral attack upon the judgment, both because his affirmative allegations do not make a case requiring a hearing and because the record shows that the issues are now foreclosed. Petitioner not only fails to show duress, but is really endeavoring to relitigate his motion to withdraw the plea of guilty which was denied, and the denial of which he did not appeal. He alleges nothing he did not know then and offers no reason for his failure to appeal.

A. The totality of petitioner's allegations, said to constitute the claim of a coerced plea of guilty, are that he was promised leniency in the Southern District as well as the Eastern and did not receive it in the Southern; that thereafter he moved to withdraw his plea in the Eastern District; and that this motion was denied without, he claims, an adequate hearing.

As against these contentions, the record shows that petitioner had an attorney both at the time he entered a plea of not guilty and also when he was allowed to change his plea to guilty. He has never alleged that this attorney was incompetent. Unless we are to relegate the appointment of an attorney to represent an indigent to a mere formalism, it is proper to assume

(absent some showing to the contrary) that he was consulted and that he properly advised petitioner when the latter changed his plea. Nor is this all. The record shows that the petitioner "was fully informed and advised of his rights * * * before acceptance of the plea" (R. 5); that when the petitioner entered his plea of guilty

> he took this step of his own volition and that he was then informed that the court had the power to and might sentence him to imprisonment, without mention of its extent [R. 41].

Again, this is nowhere controverted or denied by petitioner. Petitioner does not allege that anyone promised or could promise him a definite sentence.[11] He had been warned (and knew from experience) that the court determined the sentence not solely on what was said in court, but also upon a pre-sentence investigation. See *United States* v. *Smith*, 257 F. 2d 432 (C.A. 2), certiorari denied, 359 U.S. 926. His contentions therefore do not add up to a proper plea of coercion or

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[11] The affidavits filed by the United States below were not relied upon by the courts below in settling any material fact in dispute (R. 5, 40-42). They were merely the vehicle used to outline the record evidence and only incidentally to deny the merits of petitioner's allegation in case the court decided to have a hearing. See *Walker* v. *Johnston*, 312 U.S. 275 at 284. The affidavits do make clear that the government was prepared, if necessary, to deny petitioner's allegations. Cf. *Price* v. *Johnston*, 334 U.S. 266, 288. But there is no support for the petitioner's present assertion that, by considering the affidavits and denying the motion, "* * * it cannot be said that the court did not hear evidence or require evidence on the motion" (Pet. Br. 14). The denial by the United States was not used by the courts below as a ground for refusing petitioner a hearing, and we do not here rely upon these denials by the government.

undue influence. They are not the equivalent of the alleged threats by government agents held to raise an issue of fact in *Waley* v. *Johnston*, 316 U.S. 101. Most of those accused of crime hope for leniency by pleading guilty. *United States* v. *Harris*, 160 F. 2d 507, 508 fn. 1 (C.A. 2). However, the fact that petitioner (like many others) wished a light or suspended sentence, and later did not think he was going to get one, is not ground for vacation of his sentence. *United States* v. *Page*, 229 F. 2d 91 (C.A. 2); *Sweeden* v. *United States*, 209 F. 2d 524 (C.A. 8); *Meredith* v. *United States*, 208 F. 2d 680 (C.A. 4).

If, despite a showing of proper warning and caution, a petitioner can later allege a coerced plea merely on the basis of disappointed hopes, the door will be open to easy escape from the consequences of guilty pleas. Before a hearing is required under Section 2255, a stronger particularization of the alleged coercion or undue influence should be made than petitioner has essayed here.

B. Moreover, petitioner in essence raised the issue of the validity of his plea by his motion to withdraw it in August 1955 (*supra*, p. 8). His present attack on the denial of that motion furnishes no basis for a hearing under Section 2255. There was no obligation to make any "findings of fact" on the petitioner's original motion. *Smith* v. *United States*, 213 F. 2d 730, 731 (C.A. 6), and cases cited. Rule 32 (d) of the Federal Rules of Criminal Procedure does not impose any such requirement. Cf. Rule 23 (c); *Sullivan* v. *United States*, 348 U.S. 170, 174. If the hearing on his motion to withdraw was, as he claims, inadequate, that was a

matter for direct appellate review. *United States* v. *Swaggerty*, 218 F. 2d 875, 879 (C.A. 7), certiorari denied, 349 U.S. 959; *Friedman* v. *United States*, 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U.S. 926.

Mere trial errors—even those which would most certainly have resulted in reversal—do not in themselves furnish grounds for collateral attack. *Sunal* v. *Large*, 332 U.S. 174. This principle is particularly appropriate in this context. Here was a petitioner who had had counsel when he entered his plea of not guilty and when he changed his plea to guilty. If the denial of permission to again change his plea was a clear abuse of discretion—as he now claims—then was the time to take an appeal, when the facts and circumstances were still fresh. There is no allegation that his attorney was incompetent, nor in the face of this whole record can it be maintained that the petitioner was either barred from taking an appeal or that he did not know how. Consequently, to attempt to review such a ruling now would be improper, for it would amount to allowing an appeal over two years late, even where no excuse for not taking timely action is even suggested. This cannot be done. *United States* v. *Robinson*, No. 16, this Term, decided January 11, 1960.

Actually, the record suggests that petitioner deliberately decided not to appeal. There was little reason why he should have appealed; he had received, not the maximum sentence, but 12 years; and he had received, not a consecutive but a concurrent sentence, one which ran with previous 20-year sentences. Moreover he had an attorney and had had other proceedings in court and thus knew how to proceed. It is significant that

he filed a motion in the Southern District two days after sentence in the Eastern District, but filed nothing in the Eastern District. His subsequent conduct also suggests that his present contention is an afterthought. He filed further actions and took appeals in other courts during 1955 and 1956, but did nothing in the Eastern District. The first motion he filed in the Eastern District was on October 30, 1957, for reduction of sentence; this was denied on November 4, 1957 (R. 48), over two years after the sentence on August 8, 1955. It was not until 1958 that he started the present action, based (he states) upon his conclusion, from studies at the law library at the penal institution, that his 1955 plea was not voluntary. While mere delay is not a ground for denial of a hearing, a prior course of action so inconsistent with the present allegations could properly be taken into consideration with all the other facts of record. In the circumstances presented by this record, where petitioner once raised the issue of the validity of this plea and then apparently abandoned it, to allow him to remain silent and later use a collateral attack remedy would interfere with proper and orderly administration of the criminal law. *Wong Doo* v. *United States*, 265 U.S. 239; *Brown* v. *Allen*, 344 U.S. 443, 486.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

J. Lee Rankin,
Solicitor General.

Malcolm R. Wilkey,
Assistant Attorney General.

Beatrice Rosenberg,
Theodore George Gilinsky,
Attorneys.

February, 1960.

APPENDIX

JUDICIAL CONFERENCE DOCUMENTS

A. REPORT OF THE HABEAS CORPUS COMMITTEE, SUBMITTED AT THE 1943 SESSION OF THE CONFERENCE

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee appointed to study the subject of procedure on habeas corpus in the federal courts has given careful study to the subject, aided by officials of the Administrative Office and the Department of Justice. Mr. Will Shafroth of the Administrative Office acted as Secretary of the Committee and made a statistical study of habeas corpus proceedings in the federal courts during the fiscal year 1942. Mr. Alexander Holtzoff of the Department of Justice filed with the Committee a statement as to administrative problems in habeas corpus proceedings, sat with the Committee in the hearings and assisted in the drafting of the legislation proposed. Attached to this report are the statement of Mr. Holtzoff and the statistical tables prepared by Mr. Shafroth.

The Committee met in Washington, D. C., on May 8, 1943, and remained in session for four days during which problems relating to procedure under habeas corpus were fully discussed. It was the opinion of the Committee that the procedure in ordinary habeas corpus proceedings, such as cases arising in connection with removal, with deportation under the immigration laws or with imprisonment under process or judgment void on the face of the proceedings, was simple and well settled; and that no action, legislative or otherwise, was required with respect thereto. With regard to proceedings brought to secure the release of a petitioner imprisoned under the judgment of a state or

federal court, alleged to be void by reason of the disregard of constitutional rights of the petitioner, it was the judgment of the Committee that legislation was necessary to secure orderly procedure, to avoid unnecessary and repeated applications to different judges and to minimize the evil of unseemly conflicts between sentencing and hearing courts and between state and federal tribunals.

The present procedure in habeas corpus was adequate so long as the court hearing the application was held bound by the record made on the trial of a prisoner theretofore convicted in a state or federal court, not only with respect to questions raised on the trial but also with respect to questions that might have been raised, so that matters dehors the record could be considered only to a very limited extent as affecting the validity of the trial. In recent years, however, decisions of the Supreme Court have greatly enlarged the scope of the inquiry in habeas corpus proceedings by making that remedy available to test the validity of a judgment of a state or federal court attacked on the ground that constitutional rights of the prisoner have been violated. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Johnson* v. *Zerbst*, 304 U. S. 458; *Bowen* v. *Johnston*, 306 U. S. 19, 24; *Waley* v. *Johnston*, 316 U. S. 101, 104. As said in the case last cited:

> The facts relied on are dehors the record and their effect on the judgment was not open to consideration and review on appeal. In such circumstances the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the convic-

tion has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103; *Bowen* v. *Johnston*, 306 U. S. 19, 24.

This review of proceedings in the trial court to determine in an application for habeas corpus, by matters dehors the record, whether conviction of the prisoner has been secured in violation of his constitutional rights, extends to convictions had in state as well as in federal courts. *Smith* v. *O'Grady*, 312 U. S. 329; *Cochran* v. *Kansas*, 316 U. S. 255; *Pyle* v. *Kansas*, — U. S. —, 63 S. Ct. 177; *Sharpe* v. *Buchanan*, — U. S. —, 63 S. Ct. 245; *People* v. *Wilson*, — U. S. —, 63 S. Ct. 840. And when state remedies have been exhausted, there is doubt whether a habeas corpus proceeding can now be dismissed in the federal courts under the doctrine that such remedy will lie in the federal courts only in "rare cases when circumstances of peculiar urgency are shown to exist." See cases last cited. It has been held that habeas corpus will lie where there is allegation that petitioner's imprisonment is in violation of rights guaranteed him by the Constitution and that his remedies under state law have been exhausted. See *Mitchell* v. *Youell*, 4 Cir. 130 F. 2d 880; *Carey* v. *Brady*, 4 Cir. 125 F. 2d 253; *Gall* v. *Brady*, 39 F. Supp. 504.

Where petitioner is imprisoned under the judgment of a state or federal court, and the conviction is attacked as void on the ground that constitutional rights have been denied on the trial, it necessarily results that the court hearing the application for habeas corpus must review the proceedings of the trial court on matters very largely dehors the record. Under the present practice, no provision is made for the trial

judge to supplement the record or even for him to furnish a statement as to what occurred on the trial. On the contrary, if heard at all with respect to the matter, he must be heard as an ordinary witness. *Walker* v. *Johnston*, 312 U. S. 275. This has resulted, in one case at least, in the trial judge of a state court appearing as a witness in a habeas corpus proceeding in a federal court and testifying in defense of the proceedings had in his court. *Mitchell* v. *Yowell*, 4 Cir. 130 F. 2d 880. Since state remedies must have been exhausted as a prerequisite to application for the writ, it results in many cases that the federal District Court is reviewing on habeas corpus the constitutional validity of a judgment which has been affirmed on appeal by the highest court of a state, and frequently with respect to matters which have been fully considered on that appeal. It is unnecessary to comment on the real danger involved in a procedure which leads so readily to conflict between the state and federal jurisdictions.

While the practice of having criminal proceedings in one federal District Court reviewed and their validity determined in habeas corpus proceedings by another District Court is not open to the same objections as where a conflict between state and federal jurisdictions may arise, it is the opinion of three of the members of the Committee that this is an abuse which should be corrected, and that the question as to the constitutional validity of the trial should be raised in the trial court on motion in the nature of the old writ of error coram nobis, and that habeas corpus in another court to raise such question should not be allowed except in those rare cases where the ends of justice imperatively so require.

Another real evil which has arisen in connection with application for habeas corpus by prisoners under sentence is that there is no limitation under existing

law on the number of applications which can be made, and the time of judges is consumed in hearing repeated applications involving identical contentions. Notwithstanding denial of his application, the prisoner, under the present state of the law, has the right to present the same petition to every judge having jurisdiction in the premises. Not infrequently, the same petition is presented, notwithstanding its prior denial, to half a dozen or more judges; and each is bound to give it consideration without any regard to the principle of res adjudicata.

To remedy the evils in the present practice arising out of petitions for habeas corpus by prisoners convicted of crime in the state or federal courts, your Committee has drafted two proposed statutes, copies of which are hereto attached. The purpose of the first, marked "A," is to limit, except in rare cases, the right to apply for habeas corpus on the part of persons imprisoned under a conviction of crime in the state or federal courts and to substitute another remedy by motion in the nature of writ of error coram nobis to test the constitutional validity of the judgments under which they are imprisoned. The second, marked "B", has for its purpose the prescribing of a procedure which will obviate the abuses and inconveniences of the present procedure, in cases where resort to habeas corpus may be appropriate.

Comments on Statute "A", prescribing new remedy and limiting jurisdiction in habeas corpus.

SEC. 1. All of the members of the Committee, except Judge Underwood, are agreed on the first section of the statute as recommended. Judge Underwood agrees that the object of the section is desirable but does not approve of the machinery devised to attain it. It will be observed that the first section applies

only to the case of prisoners in custody under judgments of state courts.

The effect of the section is to require that questions as to the constitutional validity of judgments of state courts be tried in those courts. For this purpose, the statute prescribes that after the making of a motion, in the nature of application for writ of error coram nobis, in the state court, application for certiorari may be made to the Supreme Court of the United States, and that court is given power to review by certiorari the proceedings of the state court. The certiorari will bring before the Supreme Court, not only the record made on the motion, but also the judgment of conviction under which petitioner is imprisoned. The power of Congress to prescribe a remedy in the state courts, by which the deprivation of rights under the Constitution of the United States may be inquired into and record made for review by the Supreme Court of the United States, is not thought by the majority of the Committee to be subject to doubt. The proposed statute denies to federal Circuit and District Judges the power to issue writs of habeas corpus in such cases "unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the procedure prescribed."

SEC. 2. Section two applies only to prisoners in custody under judgments of federal courts. The first part of the section provides for a motion, in the nature of a writ of error coram nobis, in the court in which the prisoner was convicted, to question the validity of a judgment assailed on the ground that it was entered in violation of prisoner's constitutional rights. It is believed that this part of the section is merely declaratory of existing law. *Holiday* v. *Johnston*, 313 U. S. 342, 349. All members of the Committee agree on

this part of the section. The last sentence of the section denies to any federal Circuit or District Judge power to release under habeas corpus a prisoner authorized to apply for relief by motion under the section, unless it shall appear that it is not practicable for his rights to be determined on such motion. Judges Stephens, Underwood and Wyzanski do not agree to this sentence; and the second section of the act is accordingly presented in the alternative. It will be observed that alternative section 2 omits the last sentence contained in section 1.

Comments on Statute "B", Procedural Provisions

SEC. 1. Section one is presented in the alternative. The form favored by the majority of the Committee makes it discretionary with a Circuit or District Judge whether or not he shall entertain a petition for habeas corpus to inquire into the detention of a person under sentence of a state or federal court, when it shall appear that the legality of such detention has been determined in a prior application for habeas corpus and no new ground is presented in the present application. Judge Stone and the Chairman are of the opinion that alternative Section 1 should be adopted, the effect of which would be to limit petitioners to one application, unless a new ground is presented.

SEC. 2. The effect of this section is to permit the filing of a statement by the trial judge as to the facts occurring in the trial, in lieu of requiring that his evidence be taken like that of an ordinary witness.

SEC. 3. The purpose of this section is to facilitate the taking of evidence by permitting the use of affidavits with proper safeguards.

SEC. 4. The purpose of this section is to make admissible evidence taken in prior habeas corpus proceedings.

SEC. 5. The purpose of this section is to relieve petitioner of the binding effect of an untraversed return, which he inadvertently may have failed to deny, and to give to the answer to a notice to show cause the same evidentiary effect as the return to a writ.

SECS. 6 and 7. The purpose of these sections is to make readily available to the court material portions of records of conviction, and to enable petitioners to have the benefit thereof without cost.

Recommendation to District Courts

The Committee was impressed by a suggestion of Judge Underwood that much could be done to avoid the evils arising from application for habeas corpus by prisoners under sentence of federal courts, if greater care were exercised by trial courts in properly making of record matters as to which such applications ordinarily relate. That suggestion is as follows:

> It would seem that much could be accomplished in this way by a more careful preparation of the trial court records, in view of the rulings of the Supreme Court in the case of *Riddle* v. *Dyche*, 262 U.S. 333, and the more recent case of *Cochran* v. *Kansas*, 316 U.S. 255, in which the Court says, "We accept the court's conclusion that the record, showing that Cochran was represented by counsel throughout, and revealing on its face no irregularities in the trial, is sufficient refutation of his unsupported charge that he was denied the right to summon witnesses and testify for himself." I think it would greatly reduce the number of cases, or at least put them in such shape as to make it possible to dispose of them without great consumption of time, if the trial court, where the defendant is not represented by counsel, would not only carefully advise him of his constitutional rights,

especially that of assistance of counsel, but also, where a plea of guilty is entered, require the plea to be in writing, to be intelligently signed by the defendant and to expressly recite that he has been so advised and tendered counsel and has waived same, in addition to including in the sentence, which is now usually done, a statement of such facts. It is the practice in this Court not only to have the defendant sign the plea but also his attorney, when there is one, to establish the fact of his presence, and also to have the sentence include a recitation of his presence; and to include an express waiver of counsel in writing if there is no counsel. If this were done, many of the cases could be disposed of upon the record and the petitioner sent to the trial court for the correction of the record if he contends that same is incorrect.

Respectfully submitted.

JOHN J. PARKER,
Chairman.
KIMBROUGH STONE.
ALBERT LEE STEPHENS.
EA MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHARLES E. WYZANSKI, JR.

JUNE 7, 1943.

STATUTE "A"

A BILL To regulate the review of judgments of conviction in certain criminal cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if a prisoner in custody pursuant to a judgment of conviction of a court of any State, claiming that the judgment is void because in violation of the Constitution or laws of the United States, after exhausting all remedies in the courts of the State, moves in said court to vacate and set aside the judgment and either to discharge him or to resentence him, or to grant a new trial, and if the court denies the motion, or fails or refuses to act thereon within sixty days after it is presented, the prisoner after exhausting whatever rights of review may be accorded by the laws of the State, may apply within three months thereafter to the Supreme Court of the United States for a writ of certiorari. It shall be competent for the Supreme Court by writ of certiorari to require that the cause be certified to it for review and determination. In that event the Supreme Court shall have jurisdiction to review the proceedings had on the motion as well as the judgment of conviction for the purpose of determining the claim that the judgment is void because in violation of the Constitution or laws of the United States. No circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a judgment of conviction of a court of any State, unless it appears that there are such exceptional circumstances of peculiar urgency that the rights of the prisoner cannot be effectively preserved by the proceedings hereinabove prescribed.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it is not practicable to determine his rights on such motion because of the necessity of his presence at the hearing, or for other reason.

Judge A. L. Stephens, Judge Underwood, and Judge Wyzanski favor the following substitute for Sec. 2:

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming that the judgment is void because in violation of the Constitution or laws of the United States, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of

the term at which such judgment was entered. Such court shall thereupon cause notice of the motion to be served upon the United States attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment is void, because in violation of the Constitution or laws of the United States, the court shall vacate and set the judgment aside and shall discharge the prisoner, or resentence him, or grant a new trial, as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals.

STATUTE "B"

A BILL To regulate habeas corpus proceedings in the courts of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge shall be required to entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by any judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent judicial decision or the enactment or repeal of a statute.

SEC. 2. On a hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a prisoner pursuant to a judgment of any court of the United States or of any State, the certificate of the judge who presided at the trial re-

sulting in the judgment of conviction, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

SEC. 3. On an application for a writ of habeas corpus, evidence may be taken orally or by deposition, and in the discretion of the judge, by affidavit. If the evidence is presented in whole or in part by affidavit, any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

SEC. 4. On an application for a writ of habeas corpus documentary evidence and the transcript, if any, of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence.

SEC. 5. The allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the Judge shall find from the evidence that they are not true.

SEC. 6. On an application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of a court of the United States, the respondent shall promptly file with the court certified copies of the indictment, plea of petitioner and the judgment, or such of them as may be material to the questions raised, if the petitioner fails to attach them to his petition, and same shall be attached to the return to the writ, or to the answer to the order to show cause.

SEC. 7. If on any applicaation for a writ of habeas corpus an order has been made permitting the petitioner to prosecute the application in forma pauperis,

the clerk of any court of the United States shall furnish to the petitioner without cost certified copies of such documents or parts of the record on file in his office as may be required by order of the judge before whom the application is pending.

Judge Parker and Judge Kimbrough Stone favor the following substitute for Sec. 1:

That no circuit or district judge shall entertain any application for a writ of habeas corpus to inquire into the detention of any prisoner pursuant to a judgment of any court of the United States or of any State, if it appears that the legality of such detention has been determined by a judge of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined. A new ground within the meaning of this section includes a subsequent decision of an appellate court or the enactment or repeal of a statute. The judge who determines an application for writ of habeas corpus may, however, grant a rehearing at any time.

[Statistical tables and memorandum of Mr. (now judge) Holtzoff omitted in printing.]

B. Supplemental Report

September 28, 1943.

To the Chief Justice of the United States and Members of the Conference of Senior Circuit Judges:

Your Committee to study the subject of procedure on habeas corpus in the federal courts, after receiving letters from various judges throughout the United States, held a meeting in Washington on Monday, September 27, considered same, and begs leave to submit the following supplemental report.

1. The Committee recommends as a substitute for Statute A, Section 1, the following:

> No Circuit or District Judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any state, or to release such prisoner in any habeas corpus proceeding, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis or otherwise in the courts of the state. Where a prisoner in custody pursuant to a conviction of a court of any state, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a state court by habeas corpus, writ of error coram nobis or otherwise, files a petition for writ of habeas corpus before any Circuit or District Judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue same and shall call to his assistance two other judges so chosen that at least one of the three shall be a Circuit Judge or a Circuit Justice, who shall constitute a special court for the hearing of such petition. Appeal shall lie from such court directly to the Supreme Court of the United States. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing same, he shall dismiss the petition, to which action an appeal shall lie to the Circuit Court of Appeals for the Circuit. The phrase "no adequate remedy" as used in this section means absence of state cor-

rective process or existence of exceptional circumstances of peculiar urgency.

2. Lines 26-27 of Statute A, Section 2, for the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 34. For the words "is void because," substitute the words "has been obtained."

Line 46. For the words "that the judgment is void because", substitute the words "the right to be released on the ground that the judgment has been obtained."

Line 54. For the words "is void because", substitute the words "has been obtained."

3. Statute B, Section 1. Line 6. After the word "judge" insert the words "or court."

4. Your Committee considered a suggestion to the effect that a judge in a habeas corpus proceeding should have discretionary authority to dispense with the production of the prisoner in court, with the provision that his testimony be taken by deposition or before a commissioner. Your Committee was of the opinion that the laws should not be changed in this respect.

5. Your Committee suggested that section 832 of Title 28 U. S. C. be amended to permit an alien as well as a citizen to prosecute a habeas corpus proceeding in forma pauperis.

JOHN J. PARKER.
Chairman, for the Committee.

C. REPORT OF THE HABEAS CORPUS COMMITTEE SUBMITTED AT THE 1947 SPECIAL SESSION OF THE CONFERENCE

Report of Habeas Corpus Committee

To the Chief Justice of the United States and the Judicial Conference of Senior Circuit Judges:

The Committee on Habeas Corpus Procedure, to which the Conference referred the "jurisdictional bill," H. R. 6723 79th Congress 2d Session, for further consideration and action, met pursuant to the call of the Chairman in the Supreme Court Building in Washington, D. C., on Monday, December 16, 1946, with all members of the Committee present except Judge Kimbrough Stone, whose attendance was prevented by the illness of his wife. Also in attendance were Judge Maris of the Third Circuit, Judge Holtzoff of the District of Columbia, Messrs. Whitehurst and Shafroth of the Administrative Office, and Messrs. Bergson and Bainton of the Department of Justice.

The Committee first gave consideration to the one year limitation provision, which is not contained in the original bill as approved by the Conference. The Committee was of the opinion that it was neither feasible nor desirable to include this limitation in the bill. Habeas corpus can be availed of for the release of one imprisoned under the judgment of a court only if the judgment is void; and, if the judgment is void, no time limitation should be asserted against the release of one improperly deprived of his liberty under it. This is true, whether the invalidity of the judgment results from the fact that the court has transcended its jurisdiction, or from the fact that it has lost jurisdiction through disregard of constitutional limitations. Representatives of the Department of Justice, who had

originally insisted upon the limitation, withdrew support of it and concurred in the views of the Committee.

The Committee next gave consideration to the provision contained in the original bill for a special court of three judges to hear cases involving the validity of the judgment of a state court, where the application for habeas corpus is found by a District Judge to be meritorious. The Committee was of opinion that this provision should be restored. It is a serious matter to permit a court of the United States to try the proceedings had in a state court and hold them for naught, especially, as is frequently the case, where the proceedings of the state court have been approved and confirmed by the highest court of the state. Such setting aside of state action is certainly no less serious than the setting aside of a state statute or the action of a state administrative board, as to which action by three judges is required. To constitute a court of three judges for the hearing of such matters provides a fact finding court of a standing comparable to that of a Circuit Court of Appeals; and direct review by the Supreme Court obviates delay and gives direct control over the proceedings to the only federal court whose review of state court action has historical basis.

It should not be overlooked in this connection that not until recently was it possible for proceedings in a state court to be reviewed by any federal court except the Supreme Court of the United States, where review was by appeal, writ of error or certiorari. The expansion of the habeas corpus remedy under recent decisions, however, has made it possible for a federal District Court to try the proceedings of the state court on matters dehors the record; and cases have arisen in which the judge of a state court and lawyers who participated in a trial before him have been hailed into the federal court and examined as witnesses as to the regu-

larity and propriety of the state court proceedings. It is the view of the Committee that, when power of this sort is exercised, a court of three judges should be convened to insure, on the one hand, that the power of the state courts shall not be infringed or belittled and, on the other, that prompt relief may be afforded in proper cases.

In order that the courts may not be unduly harassed by the necessity of convening three judges to hear frivolous applications, the bill provides that, if the judge before whom the application is filed, shall determine that no reasonable ground exists for the issuance of the writ, he shall dismiss the petition, and that appeal from this action shall lie to the Circuit Court of Appeals, and not to the Supreme Court. It is believed that most of the groundless petitions with which the courts have been harassed in recent years could be disposed of under this provision, and that only in rare instances would it be necessary to convene a court of three judges. The machinery, however, would always be available to deal with any meritorious case that might arise.

Fear has been expressed that the provision for direct review of the three judge court by the Supreme Court will increase the labors of the latter court; but it is believed that this fear is not well founded. It will be observed that the review provided is by certiorari; and the Supreme Court by denying the writ can protect itself against reviews which are groundless with no more labor than is involved in considering such applications under the present system. The thought occurs that if this legislation were adopted, the Supreme Court would find in its provisions a solution of the difficulty presented by the increasing number of applications for habeas corpus made to it directly by persons imprisoned under judgments of state courts. With this final

chinery for the proper hearing of evidence and apprisal of facts, the court might well require that all applications for habeas corpus assailing the validity of state court judgments be handled through it, so that a proper record might be made before the case was brought to hearing in the Supreme Court. This would relieve the Supreme Court of the burden of hearing a multitude of groundless applications and would not impair the power of the Court to exercise original jurisdiction in those rare and exceptional cases which call for its exercise.

Your Committee has accordingly redrafted H. R. 4233 of the 79th Congress 1st Session, the bill originally approved by the Conference, with certain verbal changes which are thought to make its meaning clearer, and submits it with the recommendation that it be approved by the Conference and that its passage be recommended to Congress. Your Committee deems it unnecessary to repeat what has already been said with respect to the desirability of the enactment of legislation embodying the second section of the act, the purpose of which is to require that attacks by a prisoner upon a judgment under which he is held in custody, be made if possible, in the sentencing court and not in the court of the district where he is imprisoned; so as to avoid the unseemly procedure of one district court's being required to try the procedure of another district court upon the mere application of one who has been convicted of crime by the latter.

While the Conference did not re-refer to the Committee the procedural bill aproved by the Conference, H. R. 4232, 79th Congress 1st Session, the Committee thought it not improper to give consideration to its provisions. The Committee again approves the bill, except that three members of the Committee, Judges Stephens, Underwood and Wyzanski, think that the language immediately following the enacting clause

should be "That no Circuit or District Judge shall *be required to* entertain" etc., ~~instead of~~ "shall entertain" etc. as at present contained in the bill. Their view is that the act should make the entertaining of subsequent petitions for habeas corpus discretionary with the judge instead of establishing the rule of res judicata to the extent proposed by the bill. These judges are attaching to this report a memorandum of their views in regard to this matter and Judge Stephens, who expects to attend the next meeting of the Conference, will, in addition, state his views orally to the Conference.

Attached hereto are copies both of the jurisdictional bill as approved by the Committee and the procedural bill as approved by the Conference, as to which the Committee as a whole suggests no changes but three members of the Committee propose the change above outlined.

JOHN J. PARKER,
Chairman.
ALBERT LEE STEPHENS.
E. MARVIN UNDERWOOD.
EDGAR S. VAUGHT.
CHAS. E. WYZANSKI, JR.

The report is not signed by Judge Kimbrough Stone.

MARCH 1, 1947.

A BILL. To regulate the review of judgments of conviction in certain criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no circuit or district judge of the United States shall have jurisdiction to issue a writ of habeas corpus to inquire into the validity under the Constitu-

tion, treaties or laws of the United States of imprisonment of a prisoner held in custody pursuant to a conviction of a court of any State, or to release such prisoner in any habeas corpus proceedings, unless it shall appear that the petitioner has no adequate remedy by habeas corpus, writ of error coram nobis, or otherwise in the courts of the State. Where a prisoner in custody pursuant to a conviction of a court of any State, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution or laws of the United States, who has no adequate remedy in a State court by habeas corpus, writ of error coram nobis, or otherwise files a petition for writ of habeas corpus before any circuit or district judge of the United States, such judge shall determine whether there is reasonable ground for the issuance of the writ, and, if so, shall issue the writ and shall cause a district court of three judges to be constituted as provided by section 266 of the Judicial Code, as amended (28 U.S.C. 380a), who shall constitute a court for the hearing of such petition. The decision of such court shall be reviewable by the Supreme Court of the United States on writ of certiorari. If the judge to whom application for the writ is made shall determine that there is no reasonable ground for issuing it, he shall dismiss the petition from which action an appeal shall lie to the circuit court of appeals for the circuit, upon the filing of the certificate required by the Act of March 10, 1908 (ch. 76), entitled "An Act restricting in certain cases the right of appeal to the Supreme Court in habeas corpus proceedings, as amended" (35 Stat. 40, 28 U.S.C. 466). The phrase "no adequate remedy," as used in this section means absence of State corrective process or existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner.

SEC. 2. Any prisoner in custody pursuant to a judgment of conviction of a court of the United States, claiming the right to be released on the ground that the judgment has been obtained in violation of the Constitution, treaties or laws of the United States, or that the court was without jurisdiction, or that the sentence was not authorized by law or otherwise open to collateral attack, may apply by motion, formally or informally, to the court in which the judgment was rendered to vacate or set aside the judgment, notwithstanding the expiration of the term at which such judgment was entered. Unless the court shall determine that the motion on its face presents no ground for the relief sought, it shall thereupon cause notice of the motion to be served upon the United States Attorney and grant a prompt hearing thereon and find the facts with respect to the issues raised thereon. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. An appeal from an order granting or denying the motion shall lie to the circuit court of appeals. No circuit or district judge of the United States shall entertain an application for writ of habeas corpus in behalf of any prisoner who is authorized to apply for relief by motion pursuant to the provisions of this section, unless it appears that it has not been or will not be practicable to determine his rights to discharge from custody on such a motion because of his inability to be present at the hearing on such motion, or for other rea-

sons. Where the prisoner has sought relief on such a motion, if the circuit or district judge concludes that it has not been practicable to determine the prisoner's rights on such motion, the findings, order, or judgment on the motion shall not be asserted as a defense to the prisoner's application for relief on habeas corpus. The term "circuit judge" as used herein shall be deemed to include the judges of the United States Court of Appeals for the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1950

SUPREME COURT OF THE UNITED STATES

No. 153.—October Term, 1959.

Clarence Duke McGann, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 21, 1960.]

Per Curiam.

The writ of certiorari was improvidently granted and must be dismissed. When the case was brought here, on the meager documentation which so often is all that is presented by indigent prisoners seeking review on their own behalf, we assumed that a question involving the construction of 28 U. S. C. § 2255 called for adjudication. After argument, it became clear that the question of construction is not appropriately presented by the record because petitioner's claim upon the merits was fully considered and decided below, and we find his challenge of that action to be so insubstantial as not to have warranted bringing the case here.